IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 87

UNITED STATES OF AMERICA

—v.—

LELORD KORDEL AND ALFRED FELDTEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

INDEX TO APPENDIX

	Page
Record From the United States District Court for the Eastern District of Michigan:	
Relevant Docket Entries	1
Indictment	5
Amended Motion for a Bill of Particulars (filed February 12, 1964)	35
Order for a Bill of Particulars	37
Bill of Particulars with Amendments	39
Pre-trial Motion by Defendants to Suppress evidence	46
District Court's Memorandum Opinion of June 3, 1965, with respect to the Motion to Suppress evidence	52
Complete Transcript of Hearing on August 4-6, 1965 with respect to the Motion to Suppress including the trial judge's oral opinion denying the motion	58

Page

Record From the United States District Court for the Eastern District of Michigan:—Continued

The government's libel in Civil Action No. 20215 291

Claimant's answer to the libel 302

The government's original and supplemental interrogatories in the civil action 304

Claimant's motion to delay answering the interrogatories until completion of criminal proceedings against the claimant 329

District court's opinion of June 21, 1961 denying the motion to delay answering the government's interrogatories 337

Claimant's objections to the government's interrogatories 340

District court's memorandum and order directing claimant to respond to certain of the government's interrogatories 344

Claimant's answers (original and supplemental) to the interrogatories 345

Record From the United States Court of Appeals for the Sixth Circuit:

Original opinion of the court of appeals in the present case 353

Opinion and order of the court of appeals on rehearing 361

The order of the Supreme Court granting certiorari 371

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Criminal Docket No. 40236

THE UNITED STATES, PLAINTIFF

v.

DETROIT VITAL FOODS, INC., a corporation, LELORD KORDEL, an individual, and ALFRED FELDTEN, an individual, DEFENDANTS

RELEVANT DOCKET ENTRIES

1963

July 17 Indictment and Report filed.

Aug. 6 Deft's motion to dismiss indictment filed.

" 16 Deft's motion enjoining and restraining ptf. from issuing news releases and deft's motion to dismiss indictment heard and denied.

" 22 Transcript of Aug. 16/63, filed and returned.

" 29 Order denying motion to dismiss indictment filed and entered.

Dec. 13 Motion to dismiss filed—Hearing Jan. 6/64.

1964

Jan. 27 Motion to dismiss certain counts heard and taken under advisement with briefs to be filed. Deft's motion for bill of particulars to be amended.

Feb. 12 Amended motion for a bill of particulars, filed.

June 8 Memorandum and order dismissing counts 1, 2, 3, 6, 7 and 12, filed and entered.

1964

Oct. 29 Motion to dismiss Count Five filed—Hearing Nov. 2/64.

Nov. 2 Motion to dismiss Count Five heard and denied. Amended motion for bill of particulars heard. Trial adj. to Apr. 6/65.

Nov. 12 Order for bill of particulars, etc. filed and entered.

1965

Jan. 14 Bill of Particulars of Gov't., filed.

" 28 Gov'ts amendments to bill of particulars, filed.

Mar. 22 Motion to suppress evidence, filed. Hrg. Mar. 29/65.

Apr. 21 Motion to suppress heard and taken under advisement.

June 3 Memorandum Opinion, filed and entered.

" 22 Order that a hearing be held as set forth in the memorandum opinion of the court, filed and entered.

Aug. 6 Defts' motion to quash indictment, filed.

" 9 Motion to quash indictment heard and denied.

" 10 Jury trial commenced—Prospective jurors discharged during course of voir dire examination. Case adj. to Aug. 12/65. New prospective jurors to be summoned.

" " Order dismissing Count 5 of the indictment, filed and entered.

" 12 Jury trial resumes—adj. to Aug. 13/65.

" 13 " " " — " " Aug. 17/65.

" 17 " " " — " " Aug. 18/65.

" 18 " " " — " " Aug. 19/65.

" 19 " " " — " " Aug. 20/65.

" 20 " " " — " " Aug. 24/65.

1965

Aug. 24 Jury trial resumes—juror #11 Jean Worzniak, ill and replaced by alternate Ruth Capers, adj. to Aug. 25/65.

" 25 Jury trial resumes—adj. to Aug. 26/65.

" 26 " " " — " " Aug. 27/65.

" 27 " " " — " " Aug. 31/65.

" 31 " " " — " " Sept. 1/65.

Sept. 1 " " " — " " Sept. 2/65.

" 2 " " " — " " Sept. 3/65.

" 3 " " " — " " Sept. 8/65.

" 8 " " " — " " Sept. 9/65.

" 9 " " " — " " Sept. 10/65.

" 10 " " " — " " Sept. 13/65.

" 13 " " " — " " Sept. 14/65.

" 14 " " " — " " Sept. 15/65.

" 15 " " " — " " Sept. 16/65.

" 16 " " " — " " Sept. 29/65.

" 28 Transcript of Aug. 4/65, filed.

" 29 Jury trial resumed—adj. to Sept. 30/65.

" 30 " " " — " " Oct. 1/65.

Oct. 1 " " " — Verdicts defts. guilty as charged in Counts Four, Eight, Nine, Ten and Eleven. Ref. Bonds cont'd. Jurors discharged.

Oct. 6 Motion for judgment of acquittal notwithstanding the verdict and, in the alternative, for a new trial, filed. Hearing Oct. 25/65.

Dec. 6 Motion for judgment of acquittal notwithstanding the verdict and motion for new trial heard and denied.

1965

Dec. 13 Order denying motion for judgment of acquittal notwithstanding the verdict and in the alternative, for a new trial, filed and entered.

1966

Jan. 19 Deft. Detroit Vital Foods Inc., rep. by counsel, fine in $1,000.00 on each of Counts 4, 8, 9, 10 and 11, plus costs of prosecution under Sec. 1918 Title 28 USC.

" " Deft. Kordel, rep. by counsel, committed to the custody of the Attorney General for Two (2) years on each of Counts 4, 8, 9, 10 and 11 to run concurrently under the provisions of Sec. 4208 (a) (2). T. 18, USC. and pay a committed fine of $5,000.00 on each of Counts 4 and 11. Bond cont'd pending appeal.

" " Deft. Feldten, rep. by counsel, committed to the custody of the Attorney General for One (1) year on each of Counts 4, 8, 9, 10 and 11 to run concurrently. Execution of sentence suspended except for 30 days and deft. placed on probation for three (3) years on condition that deft. pay a fine of $1,000.00 on each of Counts 4 and 8. Bond cont'd pending appeal.

" " Notice of appeal for defts., filed.

INDICTMENT

(Filed July 17, 1963)

COUNT I

The Grand Jury charges:

That Detroit Vital Foods, Inc., a corporation, organized and existing under the laws of the State of Michigan, and trading and doing business at Detroit, Michigan, and Lelord Kordel, an individual, at the time hereinafter mentioned president of said corporation, and Alfred Feldten, an individual, at the time hereinafter mentioned treasurer of said corporation, the defendants herein, did, within the period from on or about March 25, 1960 to on or about March 28, 1960, in violation of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 331(a)], unlawfully cause to be introduced and delivered for introduction into interstate commerce at Chicago, Illinois, for delivery to Detroit, Michigan, within the Southern Division of the Eastern District of Michigan, consigned to said Detroit Vital Foods, Inc., a number of bottles, each bottle containing a number of wafers of a drug;

That displayed upon said bottles was certain labeling consisting, among other things, of the following printed and graphic matter:

Lelord Kordel's
"FRUTEX"
Fruit Salad
Natural Organic
Vitamin C
30 wafers: $1.50
Nutrition Enterprises
Distributors Chicago

DIRECTIONS: When desired as a food supplement, 1 to 6 wafers daily. Eat these wafers as you would candy. Each wafer provides 2000 Units (100 mg.) of Vitamin C—which is 333% of the minimum daily adult requirement.

INGREDIENTS: Rose Hips Vitamin C, in a base of Acerole Berry (Barbadoes Cherry), Apple, Lemon,

Orange, Apricot, Peach, Date, Fig, Grapefruit and Prune Powders, Blackberry, Cherry, Grape, Loganberry, Pineapple, Raspberry and Strawberry Natural Flavors. With necessary excipients. 84375

That accompanying said drug was additional labeling relating to said drug, namely, a number of books entitled "Eat and Grow Younger," "How to Make People Like You," and "Eat Your Troubles Away";

That said drug, when caused to be introduced and delivered for introduction into interstate commerce, as aforesaid, was misbranded within the meaning of 21 U.S.C. 352(a) in that the aforesaid additional labeling of said drug contained statements which represented and suggested that said drug was a detoxifying agent, that said drug would be adequate and effective to prevent premature aging, to aid in reducing high blood pressure, to aid in controlling brain fag, to help prevent profuse menstruation and menstrual pains, to reduce the death rate from typhoid fever, and to prevent and control colds, chills, fever, sore throat, ear ache, pharyngitis, swollen neck glands, pneumonia, acute rheumatism, dysentery, polio and influenza, which statements were false and misleading since the article would not be adequate and effective for such purposes and conditions;

That said drug, when caused to be introduced and delivered for introduction into interstate commerce as aforesaid was further misbranded within the meaning of 21 U.S.C. 352(f)(1) in that the labeling of said drug failed to bear adequate directions for use for the diseases, symptoms, conditions, and purposes for which said drug was intended, namely, for the treatment and prevention of air and food borne poisoning, impaired circulation, common colds, fatigue, alcoholism, nose bleeding, blood shot eyes, capilliary fragility, loose teeth, sneezing, and pyorrhea, to prevent old age, to hold cells together, to neutralize the effects of cigarette smoke and impure air, to prevent blood vessels and capillaries from bursting, to prevent cells within the retina from breaking down, to improve the condition of the blood vessels, to help blood circulation, to neutralize the toxins in aspirin tablets, and to aid in reducing high blood pressure and in con-

trolling brain fag, to prevent profuse menstruation and menstrual pains, to reduce the death rate from typhoid fever and to prevent and control chills, fever, sore throat, ear ache, pharyngitis, swollen neck glands, pneumonia, acute rheumatism, dysentery, polio and influenza.

The Grand Jury further charges:

That on June 26, 1946 the said Lelord Kordel was convicted in the United States District Court for the Northern District of Illinois of violation of the Federal Food, Drug, and Cosmetic Act (45 CR 488, 45 CR 490, 46 CR 1), which conviction had become final before the violation hereinbefore alleged was committed.

COUNT II

The Grand Jury further charges:

That Detroit Vital Foods, Inc., a corporation, organized and existing under the laws of the State of Michigan, and trading and doing business at Detroit, Michigan, and Lelord Kordel, an individual, at the time hereinafter mentioned president of said corporation, and Alfred Feldten, an individual, at the time hereinafter mentioned treasurer of said corporation, the defendants herein, did, on or about March 4, 1960, in violation of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 331(a)], unlawfully cause to be introduced and delivered for introduction into interstate commerce at Chicago, Illinois for delivery to Detroit, Michigan, within the Southern Division of the Eastern District of Michigan, consigned to said Detroit Vital Foods, Inc., a number of bottles, each bottle containing a number of wafers of a drug;

That displayed upon said bottles was certain labeling consisting, among other things, of the following printed and graphic matter:

Vital Foods
Special Brand
"FRUTEX"
Fruit Salad
Natural Organic
Vitamin C
300 Wafers
Detroit Vital Foods—Inc.
Distributors—Detroit, Mich.

DIRECTIONS: When desired as a food supplement, 1 to 6 wafers daily. Eat these wafers as you would candy. Each wafer provides 2000 Units (100 mg.) of Vitamin C—which is 333% of the minimum daily adult requirement.

INGREDIENTS: Rose Hips Vitamin C, in a base of Acerola Berry (Barbadoes Cherry), Apple, Lemon, Orange, Apricot, Peach, Date, Fig, Grapefruit and Prune Powders, Blackberry, Cherry, Grape, Loganberry, Pineapple, Raspberry and Strawberry Natural Flavors. With necessary excipients. 84246

That accompanying said drug was additional labeling relating to said drug, namely, a number of books entitled "Eat and Grow Younger" "How to Make People Like You," and "Eat Your Troubles Away";

That said drug, when caused to be introduced and delivered for introduction into interstate commerce, as aforesaid, was misbranded within the meaning of 21 U.S.C. 352(a) in that the aforesaid additional labeling of said drug contained statements which represented and suggested that said drug was a detoxifying agent and that said drug would be adequate and effective to prevent premature aging, to aid in reducing high blood pressure, to aid in controlling brain fag, to help prevent profuse menstruation and menstrual pains, to reduce the death rate from typhoid fever, and to prevent and control colds, chills, fever, sore throat, ear ache, pharyngitis, swollen neck glands, pneumonia, acute rheumatism, dysentery, polio and influenza, which statements were false and misleading since the article would not be adequate and effective for such purposes and conditions;

That said drug, when caused to be introduced and delivered for introduction into interstate commerce as aforesaid was further misbranded within the meaning of 21 U.S.C. 352(f)(1) in that the labeling of said drug failed to bear adequate directions for use for the diseases, symptoms, conditions, and purposes for which said drug was intended, namely, for the treatment and prevention of air and food borne poisoning, impaired circulation, common colds, fatigue, alcoholism, nose bleeding, blood shot

eyes, capilliary fragility, loose teeth, sneezing, and pyorrhea, to prevent old age, to hold cells together, to neutralize the effects of cigarette smoke and impure air, to prevent blood vessels and capillaries from bursting, to prevent cells within the retina from breaking down, to improve the condition of the blood vessels, to help blood circulation, to neutralize the toxins in aspirin tablets, and to aid in reducing high blood pressure and in controlling brain fag, to prevent profuse menstruation and menstrual pains, to reduce the death rate from typhoid fever and to prevent and control chills, fever, sore throat, ear ache, pharyngitis, swollen neck glands, pneumonia, acute rheumatism, dysentery, polio and influenza.

The Grand Jury further charges:

That on June 26, 1946 the said Lelord Kordel was convicted in the United States District Court for the Northern District of Illinois of violation of the Federal Food, Drug, and Cosmetic Act (45 CR 488, 45 CR 490, 46 CR 1), which conviction had become final before the violation hereinbefore alleged was committed.

COUNT III

The Grand Jury further charges:

That Detroit Vital Foods, Inc., a corporation, organized and existing under the laws of the State of Michigan, and trading and doing business at Detroit, Michigan, and Lelord Kordel, an individual, at the time hereinafter mentioned president of said corporation, and Alfred Feldten, an individual, at the time hereinafter mentioned treasurer of said corporation, the defendants herein, did, on or about January 12, 1960, in violation of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 331(a)], unlawfully cause to be introduced and delivered for introduction into interstate commerce at Chicago, Illinois for delivery to Detroit, Michigan, within the Southern Division of the Eastern District of Michigan, consigned to said Detroit Vital Foods, Inc., a number of bottles, each bottle containing a number of wafers of a drug;

That displayed upon said bottles was certain labeling consisting, among other things, of the following printed and graphic matter:

Vital Foods
Special Brand
"FRUTEX"
Fruit Salad
Natural Organic
Vitamin C
100 Wafers
Detroit Vital Foods • Inc.
Distributors • Detroit, Mich.

DIRECTIONS: When desired as a food supplement, 1 to 6 wafers daily. Eat these wafers as you would candy. Each wafer provides 2000 Units (100 mg.) of Vitamin C—which is 333% of the minimum daily adult requirement.

INGREDIENTS: Rose Hips Vitamin C, in a base of Acerola Berry (Barbadoes Cherry), Apple, Lemon, Orange, Apricot, Peach, Date, Fig, Grapefruit and Prune Powders, Blackberry, Cherry, Grape, Loganberry, Pineapple, Raspberry and Strawberry Natural Flavors. With necessary excipients. 83861

That accompanying said drug was additional labeling relating to said drug, namely, a number of books entitled "Eat and Grow Younger," "How to Make People Like You," and "Eat Your Troubles Away";

That said drug, when caused to be introduced and delivered for introduction into interstate commerce, as aforesaid, was misbranded within the meaning of 21 U.S.C. 352(a) in that the aforesaid additional labeling of said drug contained statements which represented and suggested that said drug was a detoxifying agent and tissue mender, that said drug would be adequate and effective to prevent premature aging, to strengthen the artery walls, to aid in reducing high blood pressure, to contribute to the health of the blood vessels in the brain and body, to aid in controlling brain fag, to help prevent

profuse menstruation and menstrual pains, to reduce the death rate from typhoid fever, and to prevent and control colds, chills, fever, sore throat, ear ache, pharyngitis, swollen neck glands, pneumonia, acute rheumatism, dysentery, polio and influenza, which statements were false and misleading since the article would not be adequate and effective for such purposes and conditions;

That said drug, when caused to be introduced and delivered for introduction into interstate commerce as aforesaid was further misbranded within the meaning of 21 U.S.C. 352(f)(1) in that the labeling of said drug failed to bear adequate directions for use for the diseases, symptoms, conditions, and purposes for which said drug was intended, namely, for the treatment and prevention of air and food borne poisoning, impaired circulation, common colds, fatigue, alcoholism, nose bleeding, blood shot eyes, capilliary fragility, loose teeth, sneezing, and pyorrhea, to prevent old age, to hold cells together, to neutralize the effects of cigarette smoke and impure air, to prevent blood vessels and capillaries from bursting, to prevent cells within the retina from breaking down, to improve the condition of the blood vessels, to help blood circulation, to neutralize the toxins in aspirin tablets, and to aid in reducing high blood pressure and in controlling brain fag, to prevent profuse menstruation and menstrual pains, to reduce the death rate from typhoid fever and to prevent and control chills, fever, sore throat, ear ache, pharyngitis, swollen neck glands, pneumonia, acute rheumatism, dysentery, polio and influenza.

The Grand Jury further charges:

That on June 26, 1946 the said Lelord Kordel was convicted in the United States District Court for the Northern District of Illinois of violation of the Federal Food, Drug, and Cosmetic Act (45 CR 488, 45 CR 490, 46 CR 1), which conviction had become final before the violation hereinbefore alleged was committed.

COUNT IV

The Grand Jury further charges:

That the Freshman Vitamin Company, trading and doing business at 12751 Capital Street, Oak Park, Michi-

gan, did, within the period from on or about March 19, 1959 to on or about January 20, 1960, receive at Oak Park, Michigan, various quantities of the following articles:

(1) Choline Bitartrate N.F. Crystals, Inositol N.F. Powdered, and Methionine N.F. Powdered, which had been shipped in interstate commerce by the New York Quinine Chemical Works, New York, New York;
(2) Cystine, which had been shipped in interstate commerce by the Nutritional Biochemical Corporation, Cleveland, Ohio;
(3) Niacinamide and Thiamine Mononit U.S.P., which had been shipped in interstate commerce by Merck & Company, Inc., St. Louis, Missouri; and
(4) Edamin, which had been shipped in interstate commerce by Shiffield Chemical, Norwich, New York;

That thereafter, within the period from on or about January 28, 1960 to on or about March 1, 1960, said Freshman Vitamin Company did cause to be fabricated a drug in tablet form which contained as components thereof various quantities of the aforesaid articles and did cause said drug to be packed into bottles;

That thereafter, on or about March 1, 1960, the said Freshman Vitamin Company caused said drug in said bottles to be delivered to Detroit Vital Foods, Inc., Detroit, Michigan;

That thereafter, within the period from on or about March 1, 1960 to on or about April 11, 1960, and while said drug in said bottles was being held for sale after shipment of the components of said drug in interstate commerce, as aforesaid, said Detroit Vital Foods, Inc., a corporation, organized and existing under the laws of the State of Michigan, and trading and doing business at Detroit, Michigan, Lelord Kordel, an individual, at the times hereinbefore mentioned president of said corporation, and Alfred Feldten, an individual, at the times hereinbefore mentioned treasurer of said corporation, the defendants herein, did, at Detroit, Michigan, within the

Southern Division of the Eastern District of Michigan, cause said drug in said bottles to be held for sale for use for various diseases, symptoms, conditions and purposes as hereinafter mentioned;

That displayed upon said bottles of said drug, while held for sale as aforesaid, was certain labeling which consisted, among other things, of the following printed and graphic matter:

Mich. Brand
KORLEEN
Tablets
Contains: Choline Citrate, Inositol, Methionine, Cysteine, Niacinamide, Thiamine (Vitamin B 1), With excipients

60 Tablets $3.00

Manufactured and packed in the State of Michigan, for distribution within the State of Michigan only, by LELORD KORDEL OF MICHIGAN • DETROIT

For the convenience of those who desire a formula of this type, each TWO TABLETS furnish:

Choline	120 mgs.	Inositol	60 mgs.
Methionine	25 mgs.	Cysteine	25 mgs.
Niacinamide	20 mgs.	Thiamin	3 mgs.

DIRECTIONS: When desired as a source of the ingredients in this formula, two to four tablets daily. (Two tablets provide 300% of minimum daily adult requirement for Thiamin and 200% of Niacin(amide). 6009

That accompanying said drug, while held for sale as aforesaid, was additional labeling relating to said drug, namely, a number of leaflets entitled "Is This a New Way to Strengthen Your Heart?", "Some Interesting Testimonials from Enthusiastic Followers," and "Special Lecture Prices," and a number of books entitled "Eat and Grow Younger," "How to Make People Like You" and "Eat Your Troubles Away";

That said drug, while held for sale as aforesaid, was misbranded within the meaning of 21 U.S.C. 352(a) in

that the aforesaid additional labeling of said drug contained statements which represented and suggested that said drug would be adequate and effective for use in the treatment of the following diseases, symptoms and conditions, namely, hardening of the arteries, defatting the arteries, liver and kidney trouble, heart attack, stroke, hemorrhage of the heart and liver, alcoholism, varicose veins, pains and cramps of varicose veins, old age, gall bladder diseases, and lowering of blood cholesterol, which statements were false and misleading in that said drug would not be adequate and effective for use in the treatment of said diseases, symptoms and conditions;

That said drug, while held for sale as aforesaid, was further misbranded within the meaning of 21 U.S.C. 352(f)(1) in that the labeling of said drug failed to bear adequate directions for use for the diseases, symptoms, conditions and purposes for which said drug was intended, namely, for the treatment and prevention of varicose veins, poor circulation, cholesterol and fatty deposits in the arteries, abnormal arteries, hardening of the arteries, degeneration of the liver, gall bladder diseases, cirrhosis of the liver, overweight, underweight, high blood pressure, arteriosclerosis, fibroid tumor of the uterus, spots on the liver, brown pigmentation spots on the skin, prostrate gland trouble, and for the treatment of pains and cramps of varicose veins, liver and kidney troubles, heart attack, stroke, hemorrhage of the heart and liver, alcoholism, and old age;

That said act of causing said drug to be held for sale as aforesaid, was an act caused to be done by said defendants while said drug was being held for sale after shipment of its components in interstate commerce as aforesaid, which act resulted in said drug being misbranded as aforesaid, in violation of 21 U.S.C. 331(k).

The Grand Jury further charges:

That on June 26, 1946 the said Lelord Kordel was convicted in the United States District Court for the Northern District of Illinois of violation of the Federal Food, Drug, and Cosmetic Act (45 CR 488, 45 CR 490, 46 CR 1), which conviction had become final before the violation hereinbefore alleged was committed.

COUNT V

The Grand Jury further charges:

That the Freshman Vitamin Company, trading and doing business at 12751 Capital Street, Oak Park, Michigan, did, within the period from on or about March 19, 1959, to on or about January 20, 1960, receive at Oak Park, Michigan, various quantities of the following articles:

(1) Choline Bitartrate N.F. Crystals, Inositol N.F. Powdered, and Methionine N.F. Powdered, which had been shipped in interstate commerce by the New York Quinine Chemical Works, New York, New York;
(2) Cystine, which had been shipped in interstate commerce by the Nutritional Biochemical Corporation, Cleveland, Ohio;
(3) Niacinamide and Thiamine Mononit U.S.P., which had been shipped in interstate commerce by Merck & Company, Inc., St. Louis, Missouri; and
(4) Edamin, which had been shipped in interstate commerce by Shiffield Chemical, Norwich, New York;

That thereafter, within the period from on or about January 28, 1960, to on or about March 1, 1960, said Freshman Vitamin Company did cause to be fabricated a drug in tablet form which contained as components thereof various quantities of the aforesaid articles and did cause said drug in tablet form to be packed into bottles;

That thereafter, on or about March 1, 1960, the said Freshman Vitamin Company caused said drug in said bottles to be delivered to Detroit Vital Foods, Inc., Detroit, Michigan;

That thereafter, within the period from on or about March 1, 1960 to on or about March 31, 1960, and while said drug in said bottles was being held for sale after shipment of the components of said drug in interstate commerce, as aforesaid, said Detroit Vital Foods, Inc., a corporation, organized and existing under the laws of

the State of Michigan, and trading and doing business at Detroit, Michigan, Lelord Kordel, an individual, at the times hereinbefore mentioned president of said corporation, and Alfred Feldten, an individual, at the times hereinbefore mentioned treasurer of said corporation, the defendants herein, did, at Detroit, Michigan, within the Southern Division of the Eastern District of Michigan, cause said drug in said bottles to be held for sale for use for various diseases, symptoms, conditions, and purposes, as hereinafter mentioned;

That displayed upon said bottles of said drug while held for sale as aforesaid, was the labeling displayed upon the bottles described in the fourth count of this indictment, which said description in said fourth count is hereby incorporated in this count;

That accompanying said drug, while held for sale as aforesaid, was additional labeling relating to said drug, namely, a number of leaflets entitled "Is This a New Way to Strengthen Your Heart?", "Some Interesting Testimonials from Enthusiastic Followers," and "Special Lecture Prices," and a number of books entitled "Eat and Grow Younger," "How to Make People Like You," and "Eat Your Troubles Away";

That said drug, while held for sale as aforesaid, was misbranded within the meaning of 21 U.S.C. 352(a) in that the aforesaid additional labeling of said drug contained statements which represented and suggested that said drug would be adequate and effective for use in the treatment of the following diseases, symptoms and conditions, namely, hardening of the arteries, defatting the arteries, liver and kidney trouble, heart attack, stroke, hemorrhage of the heart and liver, alcoholism, varicose veins, pains and cramps of varicose veins, old age, gall bladder diseases, and lowering of blood cholesterol, which statements were false and misleading in that said drug would not be adequate and effective for use in the treatment of said diseases, symptoms and conditions;

That said drug, while held for sale as aforesaid, was further misbranded within the meaning of 21 U.S.C. 352(f)(1) in that the labeling of said drug failed to bear adequate directions for use for the diseases, symp-

toms, conditions and purposes for which said drug was intended, namely, for the treatment and prevention of varicose veins, poor circulation, cholesterol and fatty deposits in the arteries, abnormal arteries, hardening of the arteries, degeneration of the liver, gall bladder diseases, cirrhosis of the liver, overweight, underweight, high blood pressure, arteriorsclerosis, fibroid tumor of the uterus, spots on the liver, brown pigmentation spots on the skin, prostate gland trouble, and for the treatment of pains and cramps of varicose veins, liver and kidney troubles, heart attack, stroke, hemorrhage of the heart and liver, alcoholism, and old age;

That said act of causing said drug to be held for sale as aforesaid, was an act caused to be done by said defendants while said drug was being held for sale after shipment of its components in interstate commerce as aforesaid, which act resulted in said drug being misbranded as aforesaid, in violation of 21 U.S.C. 331(k).

The Grand Jury further charges:

That on June 26, 1946 the said Lelord Kordel was convicted in the United States District Court for the Northern District of Illinois of violation of the Federal Food, Drug, and Cosmetic Act (45 CR 488, 45 CR 490, 46 CR 1), which conviction had become final before the violation hereinbefore alleged was committed.

COUNT VI

The Grand Jury further charges:

That Detroit Vital Foods, Inc., a corporation, organized and existing under the laws of the State of Michigan, and trading and doing business at Detroit, Michigan, and Lelord Kordel, an individual, at the time hereinafter mentioned president of said corporation, and Alfred Feldten, an individual, at the time hereinafter mentioned treasurer of said corporation, the defendants herein, did, on or about March 18, 1960, in violation of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 331(a)], unlawfully cause to be introduced and delivered for introduction into interstate commerce at Chicago, Illinois for delivery to Detroit, Michigan, within the Southern Divi-

sion of the Eastern District of Michigan, consigned to said Detroit Vital Foods, Inc., a number of bottles, each bottle containing a number of wafers of a drug;

That displayed upon said bottles was certain labeling consisting, among other things, of the following printed and graphic matter:

Lelord Kordel's
100% Natural and Organic
Super Protein
AMINEX

Each wafer furnishes 275 milligrams of total protein from a blend of Lecithinated Soya Bean Powder, nonfat milk solids, wheat germ powder, sunflower seed meal. With natural flavorings and necessary excipients.

100 Wafers • Price $2.50
Nutrition Enterprises
Distributors Chicago

AVERAGE AMINO ACID COMPOSITION
(Per One Tablet):

*Arginine	15.12 mg.	*Phenylalanine	14.85 mg.
*Lysine	19.80 mg.	*Methionine	4.68 mg.
*Tryptophany	3.33 mg.	*Leucine	25.56 mg.
Cyatine	2.97 mg.	*Valine	17.10 mg.
Threonine	11.79 mg.	Glycine	6.48 mg.
*Isoleucine	17.82 mg.	Proline	27.54 mg.
Glutamic Acid	54.45 mg.	Aspartic Acid	17.28 mg.
Alanine	8.10 mg.	Serine	15.39 mg.
*Histidine	7.38 mg.	Tyrosine	7.92 mg.

*Nutritionally essential amino acids.

Also contains: LECITHIN ..... 58.40 mg.

DIRECTIONS: Take 6 or more tablets per day, with or between meals. These tablets may be eaten in place of lunch if desired. Tablets may be chewed or dissolved in the mouth. 84404

That said drug, when caused to be introduced and delivered for introduction into interstate commerce as aforesaid, was misbranded within the meaning of 21 U.S.C. 352(f)(1) in that the labeling of said drug failed

to bear adequate directions for use for the diseases, symptoms, conditions, and purposes for which said drug was intended, namely, infections, reducing, tissue repair, to furnish normal blood supply, to promote growth, to aid women to become pregnant, and for enzyme production.

The Grand Jury further charges:

That on June 26, 1946 the said Lelord Kordel was convicted in the United States District Court for the Northern District of Illinois of violation of the Federal Food, Drug, and Cosmetic Act (45 CR 488, 45 CR 490, 46 CR 1), which conviction had become final before the violation hereinbefore alleged was committed.

COUNT VII

The Grand Jury further charges:

That Detroit Vital Foods, Inc., a corporation, organized and existing under the laws of the State of Michigan, and trading and doing business at Detroit, Michigan, and Lelord Kordel, an individual, at the time hereinafter mentioned president of said corporation, and Alfred Feldten, an individual, at the time hereinafter mentioned treasurer of said corporation, the defendants herein, did, on or about February 26, 1960, in violation of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 331(a)], unlawfully cause to be introduced and delivered for introduction into interstate commerce at Chicago, Illinois for delivery to Detroit, Michigan, within the Southern Division of the Eastern District of Michigan, consigned to said Detroit Vital Foods, Inc., a number of bottles containing a drug;

That displayed upon said bottles was certain labeling consisting, among other things, of the following printed and graphic matter:

Vital Foods
Special Brand
LECIGEN
Lecithin Granules
Rich in Natural
* Choline
* Inositol
* Phosphorus

Contains Oil-Free LECITHIN Extracted from Soybeans with 2% Tribasic Calcium Phosphate added to facilitate flow. Packed for and Distributed by NUTRITUTION ENTERPRISES, CHICAGO, ILLINOIS

8 OUNCES NET

Four teaspoonfuls (approximately 10 grams) will provide:

Natural CHOLINE	333 milligrams
Natural INOSITOL	333 milligrams
Natural PHOSPHORUS	300 milligrams

300 milligrams of Phosphorus is 40% of the minimum daily adult requirement. The standards for Choline and Inositol in human nutrition have not been established.

SUGGESTED USE: When desired as a dietary source of natural choline, inositol and phosphorus—two teaspoonfuls twice daily. May be mixed with juices, milk, water—or sprinkled over foods. 100 48

That accompanying said drug was additional labeling relating to said drug, namely, a number of books entitled "Eat and Grow Younger," "How to Make People Like You" and "Eat Your Troubles Away";

That said drug, when caused to be introduced and delivered for introduction into interstate commerce as aforesaid, was misbranded within the meaning of 21 U.S.C. 352(a) in that the aforesaid additional labeling of said drug, when viewed in its entirety as well as through the specific claims contained therein, represented and suggested that said drug would be an adequate and effective treatment for burning up accumulated cholesterol deposits, to prevent accumulated cholesterol deposits, for giving added vitality and fighting fatigue, to increase personality function and improve brain function, and to prevent nervousness, sexual decline, brain fag, nervous exhaustion, headaches, impotence, sterility, and senility, and that said drug would be an adequate and effective treatment for heart and blood vessel diseases, anemia, rheumatic carditis, diseases of the liver, kidney disorders, shattered nerves, depleted brain power,

and waning activity of vital glands, which representations and suggestions were false and misleading in that said drug would not be an adequate and effective treatment for such diseases, symptoms, and conditions;

That said drug, when caused to be introduced and delivered for introduction into interstate commerce as aforesaid, was further misbranded within the meaning of 21 U.S.C. 352(f) (1) in that the labeling of said drug failed to bear adequate directions for use for the diseases, symptoms, conditions, and purposes for which said drug was intended, namely, for burning up accumulations of fat which clog the blood vessels, varicose veins, prostate difficulties, hardening of the arteries, poor circulation, nervousness, preventing fatigue, for mental alertness, hormone production, skin pigments, constipation, preventing accumulated cholesterol deposits, giving added vitality, fighting fatigue, increasing personality function, improving brain function, preventing nervousness, sexual decline, brain fag, nervous exhaustion, headaches, impotence, sterility, senility, heart and blood vessel diseases, anemia, rheumatic carditis, diseases of the liver, kidney disorders, shattered nerves, depleted brain power, and waning activity of vital glands.

The Grand Jury further charges:

That on June 26, 1946 the said Lelord Kordel was convicted in the United States District Court for the Northern District of Illinois of violation of the Federal Food, Drug, and Cosmetic Act (45 CR 488, 45 CR 490, 46 CR 1), which conviction had become final before the violation hereinbefore alleged was committed.

COUNT VIII

The Grand Jury further charges:

That Detroit Vital Foods, Inc., a corporation, organized and existing under the laws of the State of Michigan, and trading and doing business at Detroit, Michigan, and Lelord Kordel, an individual, at the time hereinafter mentioned president of said corporation, and Alfred Feldten, an individual, at the time hereinafter mentioned treasurer of said corporation, the defendants herein, did,

within the Southern Division of the Eastern District of Michigan, on or about March 23, 1960, in violation of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 331(a)], unlawfully cause to be introduced and delivered for introduction into interstate commerce at Detroit, Michigan, for delivery to River Edge, New Jersey, consigned to Peter J. Colucio, a number of bottles, each bottle containing a number of tablets of a drug;

That displayed upon said botttles was certain labeling consisting, among other things, of the following printed and graphic matter:

(a number of bottles)

Lelord Kordel's
Vitamins • Minerals
NUTRI-
TIME
A Dietary Food Supplement

90 Tablets

Nutrition Enterprises
Distributors Chicago
A Daily Ration of NINE
NUTRI-TIME Tablets Provides

the following amounts and proportions of the minimum daily requirements for Adults and Teenagers:

VITAMINS	Amount	% MDR
Vitamin A (Palmitate)	45,000 USP units	1125%
Vitamin D (Irradiated Yeast)	3,000 USP units	750%
Vitamin C (Ascorbic Acid)	300 mg.	1000%
Vitamin B-1 (Thiamine)	20 mg.	2000%
Riboflavin (Vitamin B-2)	20 mg.	1667%
Niacinamide 75 mg. and Niacin 15 mg. total	90 mg.	900%
Vitamin B-6 (Pyridoxine HCl)	3. 5 mg.	//
Vitamin B-12 Activity (Cobalamin)	15 mcg.	//
Calcim Panthothenate	30 mg.	/
Vitamin E (Mixed Tocopherols)	30 I.U.	/
Vitamin K (Menadione)	0. 6 mg.	//
Para-Amino-Benzoic Acid	60 mg.	/
Folic Acid	0. 4 mg.	//
Biotin	11. 5 mcg	/

MINERALS

Calcium	100%	MDR*	750 mg.
Phosphorus	48%	MDR	360 mg.
Iron, Organic	900%	MDR	90 mg.
Iodine	450%	MDR	0. 45 mg.

PLUS the following factors and ingredients for which no special nutritional claims are made:

Choline Bitartrate	/ 350 mg.
Inositol	/ 150 mg.
Betaine (HCl)	/ 30 mg.
dl-Methionine	// 30 mg.
Lemon Bioflavonoid Complex	/ 30 mg.
Hesperidin Complex	/ 10 mg.
Rutin (from buckwheat)	/ 20 mg.
Intrinsic Factor Concentrate (with oral Vitamin B-12)	/ 0.1 USP unit
Lysine (mono-HCl)	/ 25 mg.
l-Cysteine (HCl)	/ 3.25 mg.
Glutamic Acid	/ 60 mg.
Nucleic Acid	/ 10 mg.
Protein (from Yeast Hydrolysate)	100 mg.
Unsaturated Fatty Acids (from Safflower Oil)	/ 60 mg.

DIRECTIONS FOR USE: When desired as a dietary food supplement, take 3 to 9 tablets daily—preferably with meals. THREE TABLETS DAILY will provide 33.3% of potencies listed and should suffice as a routine food supplement.

(a number of bottles)

Lelord Kordel's
Vitamins • Minerals
NUTRI-
TIME
A Dietary Food Supplement

90 Tablets

Nutrition Enterprises
Distributors Chicago

A Daily Ration of NINE NUTRI-TIME Tablets Provides

the following amounts and proportions of the minimum daily requirements for Adults and Teenagers:

VITAMINS

	Amount	% MDR
Vitamin A (Acetate)	45,000 USP units	1125%
Vitamin D (Irradiated Yeast)	3,000 USP units	750%
Vitamin C (Ascorbic Acid)	300 mg.	1000%
Vitamin B-1 (Thiamine)	20 mg.	2000%
Riboflavin (Vitamin B-2)	20 mg.	1667%
Niacinamide 75 mg. and Niacin 15 mg. total	90 mg.	900%
Vitamin B-6 (Pyridoxine HCl)	3. 5 mg.	//
Vitamin B-12 Activity (Cobalamin)	15 mcg.	//
Calcium Panothenate	30 mg.	/
Vitamin E (Mixed Tocopherols)	30 I.U.	/
Vitamin K (Menadione)	0. 6 mg.	//
Para-Amino-Benzoic Acid	60 mg.	/
Folic Acid	3. 5 mg.	//
Biotin	11. 5 mcg.	/

LIPOTROPIC FACTORS

Choline Bitartrate	350 mg.	/
Inositol	150 mg.	/
Betaine (HCl)	30 mg.	/
dl-Methionine	30 mg.	//

BIOFLAVONOIDS

Lemon Bioflavonoid Complex	30 mg.	/
Hesperidin Complex	10 mg.	/
Rutin (from Buckwheat)	20 mg.	/

MINERALS

Calcium	100%	MDR*	750 mg.
Phosphorus	48%	MDR	360 mg.
Iron, Organic	900%	MDR	90 mg.
Iodine	450%	MDR	0. 45 mg.
Fluorine	/ 0.05 mg.	Cobalt	/ 0. 3 mg.
Potassium	// 15 mg.	Boron	/ 0. 6 mg.
Sulphur	// 4. 5 mg.	Sodium	// 15 mg.
Magnesium	// 15 mg.	Copper	// 3 mg.
Molybdenum	/ 1. 5 mg.	Nickel	/ 3 mg.
Manganese	/ 6 mg.	Zinc	/ 3 mg.

OTHER FACTORS

Intrinsic Factor Concentrate (with oral Vitamin B-12)	0.1 USP unit
Lysine (mono-HCl)	25 mg.
l-Cysteine (HCl)	3.25 mg.
Glutamic Acid	60 mg.
Nucleic Acid	10 mg.
Protein (from Hydrolpsate)	100 mg.
Unsaturated Fatty Acids (from Safflower Oil)	60 mg.

DIRECTIONS FOR USE: When desired as a dietary food supplement, take 3 to 9 tablets daily—preferably with meals. THREE TABLETS DAILY will provide 33.3% of potencies listed and should suffice as a routine food supplement.

That accompanying said drug was certain additional labeling relating to said drug, namely, a number of books entitled "Live to Enjoy the Money you Make," "Eat Your Troubles Away," "Eat and Grow Younger" and "Health Through Nutrition";

That said drug, when caused to be introduced and delivered for introduction into interstate commerce as aforesaid, was misbranded within the meaning of 21 U.S.C. 352(a) in that the aforesaid additional labeling of said drug, when viewed in its entirety and through specific claims contained therein and in the setting in which it was presented, represented and suggested that said drug would be adequate and effective for the treatment and prevention of practically all diseases and ailments of mankind, including heart diseases, high blood pressure, hardening of the arteries, insomnia, poor circulation, arthritis, fever and aches and pains accompanying fever, sore throat, earache, pharyngitis, swollen neck glands, pneumonia, acute rheumatism, ulcers of the stomach, kidney disorders, chronic fatigue, poor posture, and constipation, for combatting infections, preventing bones from softening, helping in toning up blood vessels, for adrenal glands, overcoming sexual weaknesses, for controlling diabetic gangrene, nervous exhaustion and brain fag, which representations and suggestions were false

and misleading since said drug would not be adequate and effective for such purposes and conditions;

That said drug, when caused to be introduced and delivered for introduction into interstate commerce as aforesaid, was further misbranded within the meaning of 21 U.S.C. 352(f)(1) in that its labeling failed to bear adequate directions for use for the diseases, symptoms, conditions, and purposes for which said drug was intended, namely, for brittle bones, rickets in children, nerve and muscle health, eye health, anemia, poor mentality, insomnia, general weakness, impaired respiration, weak kidneys, female disorders, goiter, insanity, nervousness, tonsillitis and overweight, for aiding in maintaining normal heart health, warmth, vitality, magnetism and stamina, for controlling clotting of the blood, for heart diseases, high blood pressure, hardening of the arteries, insomnia, poor circulation, arthritis, fever and aches and pains accompanying fever, sore throat, earache, pharyngitis, swollen neck glands, pneumonia, acute rheumatism, ulcers of the stomach, kidney disorders, chronic fatigue, poor posture, and constipation, for combatting infections, preventing bones from softening, helping in toning up blood vessels, for adrenal glands, overcoming sexual weaknesses, for controlling diabetic gangrene, fatigue, irritability, nervous exhaustion and brain fag, and for speeding up the healing of wounds after surgery;

The Grand Jury further charges:

That on June 26, 1946 the said Lelord Kordel was convicted in the United States District Court for the Northern District of Illinois of violation of the Federal Food, Drug, and Cosmetic Act (45 CR 488, 45 CR 490, 46 CR 1), which conviction had become final before the violation hereinbefore alleged was committed.

COUNT IX

The Grand Jury further charges:

That Detroit Vital Foods, Inc., a corporation, organized and existing under the laws of the State of Michigan, and trading and doing business at Detroit, Michigan, and Lelord Kordel, an individual, at the time herein-

after mentioned president of said corporation, and Alfred Feldten, an individual, at the time hereinafter mentioned treasurer of said corporation, the defendants herein, did, within the Southern Division of the Eastern District of Michigan, on or about March 23, 1960, in violation of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 331(a)], unlawfully cause to be introduced and delivered for introduction into interstate commerce at Detroit, Michigan, for delivery to River Edge, New Jersey, consigned to Peter J. Colucio, a number of bottles, each bottle containing a number of wafers of a drug;

That displayed upon said bottles was certain labeling consisting, among other things, of the following printed and graphic matter:

Lelord Kordel's
"FRUTEX"
Fruit Salad
Natural Organic
Vitamin C
30 wafers: $1.50
Nutrition Enterprises
Distributors Chicago

DIRECTIONS: When desired as a food supplement, 1 to 6 wafers daily. Eat these wafers as you would candy. Each wafer provides 2000 Units (100 mg.) of Vitamin C—which is 333% of the minimum daily adult requirement.

INGREDIENTS: Rose Hips Vitamin C, in a base of Acerola Berry (Barbadoes Cherry), Apple, Lemon, Orange, Apricot, Peach, Date, Fig, Grapefruit and Prune Powders, Blackberry, Cherry, Grape, Loganberry, Pineapple, Raspberry and Strawberry Natural Flavors. With necessary excipients.

That accompanying said drug was additional labeling relating to said drug, namely, a number of books entitled "Eat and Grow Younger," "Eat Your Troubles Away," "How to Make People Like You," "Live to Enjoy the Money You Make," and "Health Through Nutrition";

That said drug, when caused to be introduced and delivered for introduction into interstate commerce, as

aforesaid, was misbranded within the meaning of 21 U.S.C. 352(a) in that the aforesaid additional labeling of said drug contained statements which represented and suggested that said drug would be adequate and effective for preventing premature aging, for aiding in reducing high blood pressure, for development of women's breasts, for stomach ulcers, for the treatment of gall bladder sufferers, for preventing sore throat, ear ache, pharyngitis, swollen neck glands, pneumonia, and acute rheumatism, for preventing and treating epidemic dysentery, hematuria, and hay fever, for increasing physical endurance, and combatting the effects of heat, for use as a detoxifying agent, to control the effects of brain fag, to help in preventing profuse menstruation and menstrual pain, to reduce the death rate from typhoid fever and to prevent and control colds, chills, fever, polio, and influenza, which statements were false and misleading since said drug would not be adequate and effective for such purposes and conditions;

That said drug, when caused to be introduced and delivered for introduction into interstate commerce, as aforesaid, was further misbranded within the meaning of 21 U.S.C. 352(f)(1) in that the labeling of said drug failed to bear adequate directions for use for the diseases, symptoms, conditions, and purposes for which said drug was intended, namely, for neutralizing the results of toxins in tainted foods and impure air, for overcoming toxins due to spray residues, for fever, and aches and pains of fevers, for maintaining characteristics of youth, for forming intercellular substances in bones, teeth, arteries and capillaries, for aiding the healing of wounds, for preventing premature aging, for strengthening the artery walls, for aiding in reducing high blood pressure, for development of women's breasts, for stomach ulcers, for the treatment of gall bladder sufferers, for preventing sore throat, ear ache, pharyngitis, swollen neck glands, pneumonia, and acute rheumatism, for preventing and treating epidemic dysentery, hemature, and hay fever, for increasing physical endurance, lessening fatigue, and combatting the effects of heat, for use as a detoxifying agent and tissue mender, to control the effects of brain

fag, to contribute to the health of the blood vessels of the brain and body, to help in preventing profuse menstruation and menstrual pain, to reduce the death rate from typhoid fever and to prevent and control colds, chills, fever, polio, and influenza.

The Grand Jury further charges:

That on June 26, 1946 the said Lelord Kordel was convicted in the United States District Court for the Northern District of Illinois of violation of the Federal Food, Drug, and Cosmetic Act (45 CR 488, 45 CR 490, 46 CR 1), which conviction had become final before the violation hereinbefore alleged was committed.

COUNT X

The Grand Jury further charges:

That Detroit Vital Foods, Inc., a corporation, organized and existing under the laws of the State of Michigan, and trading and doing business at Detroit, Michigan, and Lelord Kordel, an individual, at the time hereinafter mentioned president of said corporation, and Alfred Feldten, an individual, at the time hereinafter mentioned treasurer of said corporation, the defendants herein, did, within the Southern Division of the Eastern District of Michigan, on or about March 23, 1960, in violation of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 331(a)], unlawfully cause to be introduced and delivered for introduction into interstate commerce at Detroit, Michigan, for delivery to River Edge, New Jersey, consigned to Peter J. Colucio, a number of bottles, each bottle containing a number of wafers of a drug;

That displayed upon said bottles was the labeling displayed upon the bottles described in the sixth count of this indictment, which said description in said sixth count is hereby incorporated in this count;

That said drug, when caused to be introduced and delivered for introduction into interstate commerce as aforesaid, was misbranded within the meaning of 21 U.S.C. 352(f)(1) in that its labeling failed to bear adequate directions for use for the diseases, symptoms, conditions, and purposes for which said drug was intended,

namely, for helping to form antibodies, for fighting infections, for aiding digestion, and for muscle building after middle age.

The Grand Jury further charges:

That on June 26, 1946 the said Lelord Kordel was convicted in the United States District Court for the Northern District of Illinois of violation of the Federal Food, Drug, and Cosmetic Act (45 CR 488, 45 CR 490, 46 CR 1), which conviction had become final before the violation hereinbefore alleged was committed.

COUNT XI

The Grand Jury further charges:

That the Freshman Vitamin Company, trading and doing business at 12751 Capital Street, Oak Park, Michigan, did, prior to June 14, 1960, receive at Oak Park, Michigan, various quantities of the following articles:

(1) Choline Bitartrate, DL Methionine, Inositol, Stearic Acid and Mag. Stearate, which had been shipped in interstate commerce by the New York Quinine Chemical Works, New York, New York;
(2) Cystine, which had been shipped in interstate commerce by the Nutritional Biochemical Corporation, Cleveland, Ohio;
(3) Niacinamide, which had been shipped in interstate commerce by American Roland, New York, New York; and
(4) Thiamine, which had been shipped in interstate commerce by SST, New York, New York;

That thereafter, within the period from on or about June 14, 1960 to on or about July 13, 1960, said Freshman Vitamin Company did cause to be fabricated a drug in tablet form which contained as components thereof various quantities of the aforesaid articles and did cause said drug in tablet form to be packed into bottles;

That thereafter, on or about July 13, 1960, the said Freshman Vitamin Company caused said drug in said bottles to be delivered to Detroit Vital Foods, Inc., Detroit, Michigan;

That thereafter, within the period from on or about July 13, 1960 to on or about April 5, 1961, and while

said drug in said bottles was being held for sale after shipment of the components of said drug in interstate commerce, as aforesaid, said Detroit Vital Foods, Inc., a corporation, organized and existing under the laws of the State of Michigan, and trading and doing business at Detroit, Michigan, Lelord Kordel, an individual, at the times hereinbefore mentioned president of said corporation, and Alfred Feldten, an individual, at the times hereinbefore mentioned treasurer of said corporation, the defendants herein, did, at Detroit, Michigan, within the Southern Division of the Eastern District of Michigan, cause said drug in said bottles to be held for sale for use for various diseases, symptoms, conditions, and purposes as hereinafter mentioned;

That displayed upon said bottles of said drug, while held for sale as aforesaid, was certain labeling which consisted, among other things, of the following printed and graphic matter:

Mich. Brand
KORLEEN
Tablets

Contains: Choline Citrate, Inositol Methionine, Cysteine, Niacinamide, Thiamin (Vitamin B-1). With excipients.

60 Tablets $3.00

Manufactured and packed in the State of Michigan for distribution within the State of Michigan only, by LELORD KORDEL OF MICHIGAN • DETROIT

For the convenience of those who desire a formula of this type, each TWO TABLETS furnish:

Choline	120 mgs.	Inositol	60 mgs.
Methionine	25 mgs.	Cysteine	25 mgs.
Niacinamide	20 mgs.	Thiamin	3 mgs.

DIRECTIONS: When desired as a source of the ingredients in this formula, two to four tablets daily. (Two tablets provide 300% of minimum daily adult requirement for Thiamin and 200% of Niacin(amide). 6068

That said drug, while held for sale as aforesaid, was misbranded within the meaning of 21 U.S.C. 352(f)(1) in that the labeling of said drug failed to bear adequate directions for use for the diseases, symptoms, conditions, and purposes for which said drug was intended, namely, for improved circulation, varicose veins, heart ailments, high blood cholesterol, circulatory disorders, high blood pressure disturbances, to aid in burning up fatty accumulations and helping to rid body of old fats, brown spots of the skin (liver spots), and to improve functions of the glands of pigmentation;

That said act of causing said drug to be held for sale as aforesaid was an act caused to be done by said defendants while said drug was being held for sale after shipment of its components in interstate commerce as aforesaid, which act resulted in said drug being misbranded as aforesaid, in violation of 21 U.S.C. 331(k).

The Grand Jury further charges:

That on June 26, 1946 the said Lelord Kordel was convicted in the United States District Court for the Northern District of Illinois of violation of the Federal Food, Drug, and Cosmetic Act (45 CR 488, 45 CR 490, 46 CR 1), which conviction had become final before the violation hereinbefore alleged was committed.

COUNT XII

The Grand Jury further charges:

That Detroit Vital Foods, Inc., a corporation, organized and existing under the laws of the State of Michigan, and trading and doing business at Detroit, Michigan, and Lelord Kordel, an individual, at the time hereinafter mentioned president of said corporation, and Alfred Feldten, an individual, at the time hereinafter mentioned treasurer of said corporation, the defendants herein, did, on or about April 5, 1961, in violation of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 331(a)], unlawfully cause to be introduced and delivered for introduction into interstate commerce at Chicago, Illinois for delivery to Detroit, Michigan, within the Southern Division of the Eastern District of Michigan, consigned to

said Detroit Vital Foods, Inc., a number of bottles, each bottle containing a number of wafers of a drug;

That displayed upon said bottles was certain labeling consisting, among other things, of the following printed and graphic matter:

Lelord Kordel's
FRUTEX

Vitamin C in a
natural organic base
of fruit salad flavors

100 Wafers

Nutrition Enterprises
Distributors Chicago

DIRECTIONS: When desired as a food supplement, 1 to 6 wafers daily. Eat these wafers as you would candy. Each wafer provides 2000 Units (100 mg.) of Vitamin C—which is 333% of the minimum daily adult requirement.

INGREDIENTS: Vitamin C in a base of Rose Hips, Acerola Berry (Barbadoes Cherry), Apple, Lemon, Orange, Apricot, Peach, Date, Fig, Grapefruit and Prune Powders. Blackberry, Cherry, Grape, Loganberry, Pineapple, Raspberry and Strawberry Natural Flavors. With necessary excipients. 86986

That said drug, when caused to be introduced and delivered for introduction into interstate commerce as aforesaid, was misbranded within the meaning of 21 U.S.C. 352(f)(1) in that its labeling failed to bear adequate directions for use for the diseases, symptoms, conditions and purposes for which said drug was intended, namely, for soft, receding and bleeding gums, as a fighter and neutralizer of toxins, for stress for the development of tissues from protein, for mild scurvy, capillary fragility, nosebleeds, for strengthening walls of blood vessels, to aid in maintaining the characteristics of youth, and for enlarged tonsils, skin itch, and white spots on the fingernails.

The Grand Jury further charges:

That on June 26, 1946 the said Lelord Kordel was convicted in the United States District Court for the Northern District of Illinois of violation of the Federal Food, Drug, and Cosmetic Act (45 CR 488, 45 CR 490, 46 CR 1), which conviction had become final before the violation hereinbefore alleged was committed.

A TRUE BILL

/s/ ALICE M. HYKES
Foreman

LAWRENCE GUBOW
United States Attorney

/s/ JAMES FRANCIS FINN
JAMES FRANCIS FINN
Assistant United States Attorney

Dated: 7-19-63

AMENDED MOTION FOR A BILL OF PARTICULARS

(Filed February 12, 1964)

PLEASE TAKE NOTICE that the above named defendants will move the Court, pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure, for an order directing that the plaintiff, by its attorney, the United States Attorney for the Eastern District of Michigan, furnish and file a bill of particulars of the indictment, and each and every count thereof, in the following respects:

1. With respect to those counts alleging a misbranding within the meaning of 21 U.S.C. 352(a), set forth which portions of the alleged "labeling" material contain the statements, suggestions and implications which the indictment claims are false and misleading.
2. With respect to those counts alleging a misbranding within the meaning of 21 U.S.C. 352(a), set forth the respects in which the alleged labeling material is false and misleading.
3. With respect to those counts alleging a misbranding within the meaning of 21 U.S.C. 352(f)(1), set forth those respects in which it is claimed that the "labeling" fails to bear adequate directions for use.
4. With respect to all counts alleging a misbranding within the meaning of 21 U.S.C. 352(f)(1), set forth how the intention to use the articles for the diseases, symptoms, conditions and purposes stated in each count was manifested and which of the defendants manifested such intention for use.
5. Set forth the manner in which each of the books and other additional labeling material referred to in each count allegedly "accompanied" each of the articles referred to in each count so as to constitute labeling within the meaning of the Federal Food, Drug and Cosmetic Act.

The aforesaid amended motion is made upon the grounds that the said particulars are required by the defendants in order to make adequate preparation for their defense; to avoid prejudicial surprise at the trial;

to protect the defendants against a second prosecution for the same offense, and upon the further grounds that a failure to grant the aforesaid particulars will deprive the defendants of their defense to the charges contained in the indictment and a fair trial, in violation of the due process clause of the Fifth Amendment to the United States Constitution and their right to be informed of the nature and cause of the accusations made against them, as guaranteed by the Sixth Amendment.

This motion is and will be based upon the annexed affidavit of SOLOMON H. FRIEND, a member of the firm of BASS & FRIEND, attorneys for the defendants herein, Rule 7(f) of the Federal Rules of Criminal Procedure, and upon all the records and files herein, and shall be heard before HON. RALPH FREEMAN on the 24th day of February, 1964 at 10:30 A.M. in the forenoon.

Dated: New York, New York
February 10, 1964

Yours, etc.

BASS & FRIEND
Attorneys for Defendants
342 Madison Avenue
New York 17, New York

ORDER FOR BILL OF PARTICULARS

(Filed November 12, 1964)

An amended motion having been filed by the defendants for an order pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure requiring the United States of America to furnish a bill of particulars, and said motion having duly come on to be heard before the Honorable Ralph Freeman, United States District Judge, and upon reading the affidavit and memorandum of law in support of the motion and the memorandum of law in opposition thereto, and the indictment having charged misbranding in violation of 21 U.S.C. 352(a) and 352(f)(1), and after hearing Solomon H. Friend of Bass & Friend, attorneys for the defendants in support of said motion, and Lawrence Gubow, United States Attorney, by John Trumbauer, Jr., Assistant United States Attorney, in opposition thereto, and due deliberation having been had herein, it is

ORDERED AND ADJUDGED, that the United States of America shall furnish the defendants within thirty days after filing of this order, a bill of particulars. The particulars to be furnished are as follows:

1. With respect to Counts 4, 5, 8 and 9—

a) Set forth each of the statements, suggestions and implications in the alleged labeling material which the indictment claims are false and misleading.

b) Set forth the manner in which each of the books and other additional labeling material referred to in each count allegedly accompanied each of the articles referred to in each count so as to constitute labeling within the meaning of the Federal Food, Drug and Cosmetic Act.

2. With respect to Counts 4, 5, 8, 9, 10 and 11—

a) Set forth each respect in which it is claimed in each count that the labeling fails to bear adequate directions for use for the diseases, symptoms, purposes for which it is claimed the articles were intended to be used.

b) Set forth how the intention to use the articles for the diseases, symptoms, conditions and purposes stated

in each count was manifested and which of the defendants manifested such intention for use; and it is further

ORDERED, that the United States of America be directed to supply the defendants with any additional information in respect of the aforementioned particulars that is obtained by it before the trial and after the service of the bill of particulars; and it is further

ORDERED, that leave is granted to the defendants to withdraw item 2 of defendants' motion for the bill of particulars.

Dated: Detroit, Michigan,
November 12th, 1964.

/s/ RALPH M. FREEMAN
U.S.D.J.

Approved:

/s/ MILTON J. TRUMBAUER, JR.
Asst. U. S. Attorney

BILL OF PARTICULARS

(Criminal Case No. 40236)

(Filed Jan. 14, 1965)

To the Honorable Judges of the United States District Court for the Eastern District of Michigan:

Comes now the plaintiff herein, the United States of America, and, pursuant to Order of the Court dated November 13, 1964, under Rule 7(f) of the Federal Rules of Criminal Procedure, provides the following Bill of Particulars:

1(a) With respect to Counts 4, 5, 8, and 9, it is the Government's position that the labeling matter, as a whole, when read together in its entirety, makes the false and misleading representations charged in the indictment by direct statement, implication, and innuendo. Some specific statements, alleged to be false and misleading when considered alone or in context with the labeling matter as a whole, follow.

A capital letter has been assigned to each item of labeling involved in these counts. There follows a list of each disease and condition named in the count, together with the identifying letter of the piece of labeling, and where applicable, followed by a number indicating the page in that item of labeling where the claims for the disease appear.

Identifying Letter	Description and Title
A	Leaflet entitled "Is This a New Way to Strengthen Your Heart"
B	Leaflet entitled "Some Interesting Testimonials From Enthusiastic Followers"
C	Leaflet entitled "Special Lecture Prices"
D	Book entitled "Eat and Grow Younger"
E	Book entitled "How to Make People Like You"
F	Book entitled "Eat Your Troubles Away"
G	Book entitled "Live to Enjoy the Money You Make"
H	Book entitled "Health Through Nutrition"

Count 4—Korleen

Hardening of the arteries—A 1, 2; C; D 108-109, 131-132; E 177-193, esp. 188-190
Defatting the arteries—A 1; C; D 108-109, 115; F 177-193, esp. 188-190
Liver and kidney trouble—A 1; C
Heart attack—A 2; F 177-193
Strokes—A 1, 2
Hemorrhage of the heart and liver—A 2
Alcoholism—A 2
Varicose veins—A 2; C
Pains and cramps of varicose veins—A 2; B 1
Old age—B 2; C; F 110, 115
Gall bladder diseases—C
Lowering of blood cholesterol—C; D 108-109, 115; F 115, 177-193, esp. 188-190

Count 5—Korleen

Hardening of the arteries—A 1, 2; C; D 108-109, 131-132; F 177-193, esp. 188-190
Defatting the arteries—A 1; C; D 108-109, 115; F 177-193, esp. 188-190
Liver and kidney trouble—A 1; C
Heart attack—A 2; F 177-193
Strokes—A 1, 2
Hemorrhage of the heart and liver—A 2
Alcoholism—A 2
Varicose veins—A 2; C
Pains and cramps of varicose veins—A 2; B 1
Old age—B 2; C; F 110, 115
Gall bladder diseases—C
Lowering of blood cholesterol—C; D 108-109, 115; F 115, 177-193, esp. 188-190

Count 8—Nutri-Time

Throughout D, F, G and H, the labeling involved in this count, every ailment known to man is said to be amenable to effective self-treatment by the ingestion of vitamins and minerals. Nutri-Time is specifically named in G 67, 245 as "a good, well-balanced vitamin formula"

that is necessary to supplement the diet. Moreover, in the books, readers are advised to supplement their diet with various vitamins in "concentrated form"—D 97, 100; F 235; H 244, 264-271, 281, 283.

Throughout the books, each of the vitamins and minerals is promoted as a cure for the specific conditions alleged in Count 8. These conditions, and some places where they are mentioned, follow.

Practically all diseases and ailments of mankind—D 9-307; F 11-308; G 13-246; H 7-301
Heart disease—D 100; F 188-190, 191-192, 249; G 70-72, 94; H 90-95
High Blood Pressure—F 190-192; G 46, 71, 72, 93-94; H 274
Hardening of the Arteries—D 108; F 188-190, 191-192; G 46-49, 69, 104-105
Insomnia—D 220; F 164; H 197
Poor circulation—H 60
Arthritis—F 108-110; H 218-223
Fever and Aches and Pains Accompanying Fever—F 248; H 277, 281
Sore Throat—H 278, 281
Earache—H 278, 281
Pharyngitis—H 278, 281
Swollen Neck Glands—H 278, 281
Pneumonia—G 15; H 278, 281
Acute Rheumatism—F 230-231; H 278, 281
Ulcers of the stomach—G 173; H 278, 281
Kidney Disorders—F 228; H 278-279, 281
Chronic Fatigue—F 56-59, 132-133, 245; G 185-186; H 280, 281, 284
Poor Posture—H 284
Constipation—H 284
Infections—H 278, 281
Preventing bones from softening—D 95-97; H 283
Helping in toning up blood vessels—H 284
Adrenal Glands—F 78-81; H 280-281
Overcoming Sexual Weaknesses—F 92-93; G 205-206
Controlling Diabetic Gangrene—F 170
Nervous Exhaustion—F 127-131; G 179-181
Brain Fag—G 181-186

Count 9—Frutex

Preventing Premature Aging—D 66-86, esp. 76-78; E 74-77
Reducing High Blood Pressure—D 78; E 26; F 191; G 72, 94
Development of Women's Breasts—F 96-97
Stomach Ulcers—E 173; F 247; H 278
Treating Gall Bladder Sufferers—H 147
Preventing Sore Throat—F 246; H 278
Preventing Ear Ache—F 246; H 278
Preventing Pharyngitis—F 246; H 278
Preventing Swollen Neck Glands—F 246; H 278
Preventing Pneumonia—F 246; H 278
Preventing Acute Rheumatism—F 246; H 278
Preventing and Treating Epidemic Dysentery—F 247; H 278
Preventing and Treating Hematuria—H 279
Preventing and Treating Hay Fever—H 279
Increasing Physical Endurance—F 247-248; H 280
Combatting the effects of heat—F 247-248; H 280
Detoxifying Agent—F 246, 247; H 277-278
Controlling effects of brain fag—E 95, 150; H 37
Preventing profuse menstruation and menstrual pain—F 100
Reducing death rate from typhoid fever—F 247
Prevent and control colds—F 159-160
Prevent and control chills—F 159
Prevent and control fever—F 159
Prevent and control polio—F 246
Prevent and control influenza—D 78; F 246

1(b). *Counts 4 and 5*

During the series of lectures, advertised and sponsored by Detroit Vital Foods, Inc., given by Lelord Kordel in Detroit during the period March 29-April 8, 1960, the literature, some of which was distributed free of charge and some for which a charge was made at the lectures, was discussed and recommended by Lelord Kordel as indicating the value of Korleen Tablets or their ingredients, among others, and was on display with the Korleen Tablets, which were discussed and recommended for various

ailments, and which were for sale and sold at the lectures and at the Detroit Vital Food Stores in Detroit to which Mr. Kordel referred the people attending. There was also at Detroit Vital Foods, Inc. warehouse, at 22131 Grand River, Detroit, stocks of Korleen Tablets and stocks of the books, "Eat and Grow Young" and "How To Make People Like You."

Counts 8 and 9

During a lecture series in New York City, Lelord Kordel, after discussing and recommending the literature as indicating the value, among others, of the drugs, Nutri-Time and Frutex and their ingredients, and after discussing and recommending the drugs and their ingredients for various ailments, solicited mail orders for both the literature and the drugs, and referred the persons attending the lectures to defendant A. J. Feldten, at the lecture hall, who took the orders. The literature and the products were subsequently shipped together from Detroit, Michigan, to the consignee named in these counts. 2(a) In each of Counts 4, 5, 8, 9, 10, and 11, it is alleged that the drug involved in that count was intended by defendants to be used for certain specific purposes, primarily the treatment and prevention of various disease conditions. The manner in which these intended uses were manifested is set forth below. In each case, the labeling of the drug failed to bear adequate directions for use because it did not state:

(a) that the drug was intended to be used for each such intended purpose, including a statement of all the disease conditions which the drug was intended to treat or prevent;
(b) the quantity of dose of the drug to be taken for each such purpose and for the effective treatment or prevention of each such disease condition, specifying where necessary, adjustments necessary due to differences in age or physical condition of the person taking the drug;
(c) the frequency of administration of the drug for each such purpose and for the effective treatment or prevention of each such disease condition;

(d) the duration of administration of the drug for each such purpose and for the effective treatment or prevention of each such disease condition;

(e) the time of administration of the drug for each such purpose and for the effective treatment or prevention of each such disease condition, in relation to time of meals, time of onset of symptoms, or other time factors.

2(b) The intention to use the articles for the diseases, symptoms, conditions and purposes stated in each count was manifested orally by Lelord Kordel during a series of lectures at New York City during the period March 7-17, 1960, and at Detroit, Michigan, during the period March 29-April 8, 1960, and by Lelord Kordel, Detroit Vital Foods, Inc. and Alfred Feldten, by advertising and sponsoring said lectures and by use of the various pieces of written, printed and graphic matter enumerated in each count, in conjunction with the promotion and sale of each of the drugs listed in each of the counts.

United States Attorney

Assistant United States Attorney

Jan. 14, 1965

AMENDMENTS TO BILL OF PARTICULARS

(Criminal Case No. 40236)

(Filed Jan. 28, 1965)

NOW COMES plaintiff by Lawrence Gubow, United States Attorney and Milton J. Trumbauer, Jr., Assistant United States Attorney, both for the Eastern District of Michigan and herewith make the following Amendments to the Bill of Particulars filed by the plaintiff in the above-entitled matter on January 14, 1965:

Page 6, line 17:

Strike the present line 17 and substitute therefor:

"During a lecture series in New York City given during the period March 7-March 17, 1960, Lelord Kordel, . . ."

Page 6, line 25:

Omit the word "together" so that the line reads:

". . . subsequently shipped from Detroit, Michigan to the consignee . . ."

Page 8:

Strike the entire answer on page 8, 2(b) and substitute the attached page.

2(b) The intention to use the articles for the diseases, symptoms, conditions and purposes stated in each count was manifested orally by Lelord Kordel during a series of lectures at New York City during the period March 7-17, 1960 (Counts 8, 9, and 10); and at Detroit, Michigan during the period March 29-April 8, 1960 (Counts 4 and 5) and during the period April 4-April 14, 1961 (Count 11); and by Lelord Kordel, Detroit Vital Foods, Inc., and Alfred Feldten, by advertising and sponsoring said lectures and by use of the various pieces of written, printed and graphic matter enumerated in each count, in conjunction with the promotion and sale of each of the drugs listed in each of the counts.

LAWRENCE GUBOW
United States Attorney

MILTON J. TRUMBAUER, JR.
Assistant U. S. Attorney

Dated: January 28, 1965

MOTION TO SUPPRESS EVIDENCE

(Filed March 22, 1965)

NOW COME defendants and move for an order (1) suppressing any evidence or leads therefrom obtained by the Federal Government in compulsory discovery proceedings instituted by the Government in *U. S.* v. *An article of drug consisting of thirty-nine cases . . . Korleen . . . and "Frutex" etc.*, (Civil No. 20215), on the ground that the use of such evidence or leads therefrom in the instant criminal case is violative of defendants' rights to a fair trial, constitutes an unconstitutional exercise of inquisitorial authority, and is violative of civilized standards of procedures in the administration of criminal justice; or in the alternative, (2) for a hearing for the purposes more particularly set forth in the annexed memorandum of law.

This motion is made and will be based on the annexed affidavit of Solomon H. Friend, sworn to the 12th day of March, 1965, the papers and proceedings had in Civil Case No. 20215, and the memorandum of law to be submitted in support hereof.

/s/ BASS & FRIEND
BASS & FRIEND
Attorneys for the Defendants
Office and P. O. Address
342 Madison Avenue
New York, New York 10017

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

SOLOMON H. FRIEND, being duly sworn, deposes and says:

I am a member of the firm of Bass & Friend, attorneys for the defendants herein. I submit this affidavit in support of the annexed motion to suppress any evidence or leads therefrom obtained by the Federal Government by compulsory discovery proceedings in a companion civil action filed in this Court on June 9, 1960 (Civil No. 20215), in which my firm was likewise the attorneys.

The facts giving rise to the necessity of this motion are as follows:

On June 9, 1960, a civil seizure action was commenced in this Court charging that the articles "Korleen" and "Frutex" were misbranded within the meaning of 21 U.S.C. 334, 352(a) and 352(f)(1). In connection with the said action and on or about January 9, 1961, the Government served written interrogatories ostensibly containing 65 separately numbered questions, but in reality, with their numerous subdivisions and cross references, contained more than 1,000 separate and distinct questions requesting information as to every conceivable detail of the defendants' activities in their business and of the alleged misbranding charges.

Almost simultaneously with the service of the Government interrogatories, and on or about January 19, 1961, the Government commenced a proceeding under Sec. 305 of the Federal Food, Drug and Cosmetic Act (21 U.S.C. 335), wherein it was stated that investigation of the defendants' acts had indicated their responsibility for criminal violations of the Federal Food, Drug and Cosmetic Act, and that criminal action was contemplated. The said notice of hearing contained a specification of various charges which were identical to the allegations contained in the civil action insofar as it pertained to the articles "Korleen" and "Frutex."

On or about April 7, 1961, your deponent filed a motion objecting to answering the Government's interrogatories and to stay the said civil proceedings and the filing of answers until after the disposition of the criminal proceedings instituted by the Government, on the ground that through the use of interrogatories, the Government was attempting to obtain information not ordinarily available to it in a criminal case for use in the criminal action which the Government was planning against defendants.

The said motion was denied by Hon. Theodore Levin, District Judge of this Court, in a memorandum and order filed on June 21, 1961, directing the filing of answers to the Government's interrogatories.

On June 27, 1961, your deponent filed a motion for reconsideration of Judge Levin's decision, again calling attention to the fact that the Government's interrogatories required the disclosure of information which not only would support the contemplated prosecution against defendants but which would reveal their entire defense to such a prosecution. The said motion for reconsideration called the Court's attention to numerous authorities holding that under similar circumstances, civil proceedings and discovery, are usually deferred in the interest of substantial justice and sound public policy, where a related criminal proceeding is pending or contemplated.

Said motion for reconsideration was denied by Judge Levin and, accordingly, answer to the Government's interrogatories were served.*

All of the documents filed in the civil action above referred to, including the memorandum by Judge Levin, the Government's interrogatories, additional interrogatories, answers to interrogatories, supplemental answers to interrogatories and the pleadings, are incorporated by reference and made a part of this motion as though fully set forth herein. To avoid bulk, the file in the said civil action will be requisitioned from the Clerk of the Court and handed up upon the argument of this motion.

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* During the interim, the Government had served a few hundred additional written interrogatories, and answers to these were also served.

Thereafter, on or about July 17, 1963, the instant indictment was filed. The said indictment originally contained 12 counts but counts 1, 2, 3, 6, 7 and 12 thereof were dismissed by this Court on June 8, 1964 on defendants' motion. Of the remaining 6 counts, it appears that 4 of them, to wit, counts 4, 5, 9 and 11, allege criminal violations of the Federal Food, Drug and Cosmetic Act which are identical with the violations alleged in the original civil action. The literature which it is claimed constitutes labeling for the articles, and the acts of the defendants herein and talks delivered by defendant Lelord Kordel, which it is claimed misbrand the articles, are identical. The said counts allege violations of the same sections of the Act, to wit, 21 U.S.C. 352(a) and 352(f)(1), which are alleged in the civil suit. In short, 4 counts of the instant indictment seek redress for identical alleged violations and are premised upon substantially identical facts as were involved in the civil suit.

Most significantly, the Government's opposition to your deponent's motion before Judge Levin to defer the filing of answers to the Government's interrogatories and to stay the civil proceedings was that formal criminal proceedings had not *yet* been and might not ever be instituted. The Government admitted, however, that the prerequisite proceeding to criminal prosecution, as set forth in 21 U.S.C. 335, had been filed against defendants and that its investigation at that time indicated defendants' responsibility for the same criminal violations of the Act as were the subject of the civil action.

Your deponent argued that criminal proceedings were, at the very least, being planned by the Government and that it was therefore manifestly unfair, contrary to public policy and the orderly administration of criminal justice to allow the Government to obtain, via compulsory discovery in a civil suit brought to redress the identical wrong involved in the criminal action, information which not only would assist the Government in filing a criminal action but would also disclose the defendants' entire defense thereto. Your deponent contended that it was improper to allow the Government to utilize the Federal Rules of Civil Procedure with respect to discovery, to

circumvent *criminal* procedures which prohibit obtaining such information from a defendant or contemplated defendant in a criminal action. In short, your deponent made vigorous and timely protest against submitting answers to the Government's interrogatories which could assist the Government in its criminal action.

Your deponent does not intend, by the instant motion, to reargue Judge Levin's decision and order wherein he required the submission of incriminating evidence and the disclosure of defendants' entire defense to the criminal action being readied by the Government. Most certainly, however, while under Judge Levin's decision, the Government had the right to use such information in connection with its *civil* action, Judge Levin's ruling should not permit, nor indeed does it require, that the Government be allowed to use the very same evidence in the instant criminal prosecution which it has brought against the defendants herein.

As will be shown in the accompanying memorandum of law, ample judicial precedents exist for the suppression of such evidence or leads therefrom obtained in the manner aforesaid, because said evidence was obtained by compulsory discovery procedures which, although lawful in itself, would constitute an unconstitutional exercise of inquisitorial authority if such evidence were used in the criminal trial. Moreover, it will be shown that to sanction the procedure used by the Government herein, would allow the Government to "whip-saw" a prospective defendant for criminal violations of the Federal Food, Drug and Cosmetic Act by first filing a civil seizure action which permits the use of discovery procedures, and then using the information thus obtained to bring a criminal prosecution for the same alleged wrong. A defendant would thus be in the situation of being required, as the price of defending himself in the civil action, to give evidence to assist the Government in a criminal prosecution.

Your deponent does not suggest that the Government must elect as between bringing a civil suit or a criminal prosecution in order to redress alleged violations of the Federal Food, Drug and Cosmetic Act. Your deponent

concedes that both procedures are available to the Government. Your deponent contends, however, that the Government may not utilize in a criminal action brought to redress the same wrong which forms the basis of the civil suit, information obtained by compulsory discovery for ostensible use in the civil suit. Such a procedure, if permitted by this Court, would do violence to the concepts of fair play and the orderly administration of criminal justice and circumvent criminal procedures which find their rights in historical and settled principles of criminal jurisprudence. The use of information obtained by compulsory discovery, when used to assist the Government to convict a defendant of a crime, is, as was so aptly stated in *Boyd* v. *U. S.*, 116 U.S. 616, 631, 632, "contrary to the principles of a free government" and ". . . abhorrent to the instincts of an American."

WHEREFORE, defendants' motion to suppress any evidence or leads therefrom elicited by compulsory discovery in Civil No. 20215 should be granted.

/s/ SOLOMON H. FRIEND
SOLOMON H. FRIEND

Sworn to before me this
12th day of March, 1965.

/s/ ROBERT ULLMAN
ROBERT ULLMAN
Notary Public, State of New York
No. 24-4051700
Qualified in Kings County
Commission Expires March 30, 1965

MEMORANDUM OPINION

(Filed June 3, 1965)

APPEARANCES:

LAWRENCE GUBOW, ESQ.
United States Attorney
MILTON J. TRUMBAUER, JR., ESQ.
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819 Federal Building
Detroit, Michigan, 48226

Attorneys for Plaintiff.

MILTON A. BASS, ESQ.
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BASS AND FRIEND
342 Madison Avenue
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Attorneys for Defendants.

FREEMAN, District Judge.

In this criminal prosecution under the Federal Food, Drug and Cosmetic Act alleging violations of 21 U.S.C. § 352(a) and § 352(f)(1) of the Act by reason of "misbranding" certain articles, defendants now move to suppress any evidence obtained by the Government as a result of discovery proceedings in the earlier civil case of *United States* v. *An article of drug * * * Korleen Tablets*, etc., Civil No. 20215 in this Court.

In the earlier civil case, a condemnation proceeding against the allegedly misbranded drugs in question, in which case the defendant, Detroit Vital Foods, Inc., in the instant criminal case intervened and filed claim to the seized goods, the Government on January 6, 1961, filed extensive interrogatories seeking details of claimant's business activities, and on January 19, 1961, commenced a proceeding under 21 U.S.C. § 335 preliminary to the bringing of a criminal action, giving claimant, Detroit Vital Foods, Inc., a notice of hearing to present its views with respect to such contemplated criminal proceeding. In April, 1961, claimant moved to stay the civil proceedings and filing of answers to interrogatories until

after the disposition of the threatened criminal action on the ground that the Government was attempting to obtain information not ordinarily available in a criminal case by means of civil discovery procedure. In a Memorandum and Order by Judge Levin on June 21, 1961, the motion was denied. Judge Levin noted that criminal action might never be taken at all and stated further:

> "The Government could obtain data for a criminal prosecution from the testimony elicited during the trial in this civil action or through subpoenaing books and records of the claimant. Therefore, it does not seem to be in the interests of justice to deny such information to the Government because it seeks it by way of the discovery procedures."

Thereafter, defendant corporation answered the interrogatories, which were signed by individual defendant Alfred Feldten, Vice-President of the corporation.

Defendants' motion to suppress claims that the use in this criminal case of evidence obtained in the civil case violates defendants' right to a fair trial, constitutes an unconstitutional exercise of inquisitorial authority, and violates civilized standards of procedure in the administration of criminal justice. Defendants also request a hearing to determine the date on which the Government actually decided to initiate a criminal prosecution.

More specifically, defendants claim that the use of the evidence obtained in the civil case violates the Fifth Amendment privilege against self incrimination, and especially the Fourth Amendment right against the use of evidence obtained by unreasonable search and seizure. Defendants place primary reliance upon *Boyd* v. *United States*, 116 U.S. 616, which was a civil seizure action to declare a forfeiture of certain goods alleged to have been fraudulently imported without paying the duties thereon. The trial court ordered claimants of the goods to submit invoices for discovery under a statute authorizing such discovery and providing that failure to comply would constitute confession of the allegations stated. The court struck down the statute, holding:

> "* * * we are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment."

The Government contends in its brief that the *Boyd* case is inapposite, in that the court limited its ruling to private books and papers of the owner, who was an individual rather than a corporation. It is true that the precise holding was limited to private books and papers of an individual. However, other language in the *Boyd* case suggests that the holding was placed on a broader basis than the Fourth Amendment and would also apply to bar the use in evidence in a criminal action of compelled discovery of admissions in a civil action concerning the same transaction. Thus, the court stated:

> "Now it is elementary knowledge, that one cardinal rule of the court of chancery is never to decree a discovery which might tend to convict the party of a crime, or to forfeit his property. And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government."

The information obtained by the use of interrogatories in civil action # 20215 was not confined to information which was obtainable from examination of corporate books and records which were subject to subpoena. The interrogatories called for admissions by the corporation as well. As such they constituted "a discovery which might tend to convict the party of a crime" and "compulsory discovery by extorting the party's oath." Thus, under the broad language of the *Boyd* case, the use of the admissions obtained by discovery in the civil action may well be barred by the Fourth Amendment from use as evidence in the criminal case.

The Government cites *Essgee Company* v. *United States*, 262 U.S. 151 (1923), for the proposition that a corporation is not protected by the Fourth Amendment from the subpoena of its books and records by a grand jury in a criminal case. The Court expressly distinguished the *Boyd* case as involving an unreasonable search and seizure of documents and records of an individual and noted "the more limited application of the Amendments to the compulsory production of corporate documents and papers * * *." Defendant concedes that *Essgee* and other cases such as *United States* v. *White*, 322 U.S. 694 (1944), limit the holding in *Boyd* with respect to corporate books and records. However, defendant contends that these cases do not limit *Boyd* with respect to admissions obtained by compulsory discovery in a related civil action. It is true that *Essgee* makes no reference to admissions by discovery, but it is also true that *Boyd* makes only indirect reference to admissions without expressly holding that they are barred by the Fourth Amendment from use in evidence in a criminal case.

Insofar as the answers to interrogatories in the civil case supplied information obtainable from corporate books and records which were subject to subpoena in any event in criminal proceedings, the use of such information cannot be said to be the result of an unreasonable search and seizure within the meaning of the Fourth Amendment, in view of the holding in *Essgee* that the Fourth Amendment does not protect the corporation from subpoena of its books and records in a criminal case. Whether the use of admissions not obtainable from corporate books and records is barred by the Fourth Amendment is a more difficult question not resolved by that case.

Both the Government and defendants rely on *Abel* v. *United States*, 362 U.S. 217 (1960), in support of their positions. The Government claims that *Abel* stands for the proposition that evidence obtained by virtue of lawful civil process is admissible in a subsequent criminal case. Defendants claim that *Abel* condemns the use of lawful civil process as a method of obtaining evidence in the preparation of a criminal case. In *Abel*, the Supreme

Court held that a search and seizure incidental to an arrest of an unregistered alien pursuant to an administrative warrant for deportation by administrative authorities from the Immigration and Naturalization Service did not constitute an unreasonable search and seizure under the Fourth Amendment, since the record did not establish bad faith by the Government in using an administrative arrest as a method of gathering evidence for a criminal prosecution for espionage. Thus the effect of the holding was to allow in evidence in the criminal prosecution, material seized incident to the administrative arrest. However, the Court clearly predicated its holding upon a finding that the Government did not in the particular case use the administrative warrant as an improper instrument of the F.B.I. in obtaining evidence for a criminal prosecution, contrary to appellant's claim. The Court stated:

> "Were this claim justified by the record, it would indeed reveal a serious misconduct by law-enforcing officers. The deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts. The preliminary stages of a criminal prosecution must be pursued in strict obedience to the safeguards and restrictions of the Constitution and laws of the United States."

The Court stated further (p. 230):

> "We emphasize again that our view of the matter would be totally different had the evidence established, or were the courts below not justified in not finding, that the administrative warrant was here employed as an instrument of criminal law enforcement to circumvent the latter's legal restrictions, rather than as a bona fide preliminary step in a deportation proceeding. *The test is whether the decision to proceed administratively toward deportation was influenced by, and was carried out for, a purpose of amassing evidence in the prosecution for crime.*" (Emphasis added)

In *Abel*, the dissenting opinion (four Justices) was of the view that the Fourth Amendment does not permit an unconfined search of the premises "upon a purely executive arrest." Justices Black and Douglas, in a separate dissenting opinion, concluded that the record established bad faith by the Government in the particular case.

In the instant case, defendants contend that the Government was contemplating criminal proceedings at the time interrogatories were filed in the civil action. If, in fact, the decision to institute the civil action and to file interrogatories "was influenced by, and was carried out for, a purpose of amassing evidence in the prosecution for crime," within the language of the test as announced in the *Abel* case, then evidence procured by admissions in answer to the interrogatories must be suppressed.

On oral arguments of the motion to suppress, the United States Attorney expressed his willingness, in light of the *Abel* case, to have a hearing to determine the Government's motive in instituting the civil action.

In order to determine whether the Government was proceeding in good faith when it filed the interrogatories, a hearing as requested by defendants must be held. An appropriate order may be submitted.

/s/ RALPH M. FREEMAN
United States District Judge

DATED: June 3rd, 1965.

[fol. 1]

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

Southern Division

No. 40236

Filed U.S. District Court, East. Dist. Mich.
September 28, 1965, 3:51 P.M.

UNITED STATES OF AMERICA, PLAINTIFF

vs.

DETROIT VITAL FOODS, INC., a corporation, LELORD KORDEL, an individual, and ALFRED FELDTEN, an individual, DEFENDANTS

Proceedings had and testimony taken in the above-entitled matter before the Honorable Ralph M. Freeman, District Judge, at Detroit, Michigan, commencing on Wednesday, August 4, 1965.

APPEARANCES:

MILTON J. TRUMBAUER, Esq., Assistant United States Attorney

WALTER E. BYERLEY, Esq., Department of Health, Education & Welfare
Appearing on behalf of the Government

BASS & FRIEND
By SOLOMON H. FRIEND, Esq.

Appearing on behalf of the Defendants

INDEX

Witness	Direct	Cross	Redirect	Recross
George T. Daughters	50	115	124	
George R. Fowler	138	219	227	
Josh Randolph	235	247	258	
Walter E. Byerley	273	288		
Milton J. Trumbauer	294	301		

DEFENDANTS' EXHIBIT NO.	Page
1—Carbon copy of notice of hearing dated January 19, 1961, and attached charge sheets	57
2—Office Memorandum dated March 25, 1960, and attachments	65
3—Carbon copy of recommendation for seizure (Korleen)	72
4—Carbon copy of recommendation for seizure (Frutex)	72
5—Letter dated December 29, 1960, signed K. L. Milstead	78
6—Carbon copy of letter dated February 1, 1961	86
7—Letter dated March 10, 1961, from F. K. Killingsworth	90
8—Photostatic copies of pages 1, 5, 6, 7 and 8 of Summary and Recommendation of Detroit District, dated 7/28/61	113
9—Carbon copy of letter dated September 27, 1961, to Administration, Attention Josh Randolph, from George R. Fowler	163
10—Copy of letter dated May 23, 1962, to Administration, Attention Mr. Randolph, from George R. Fowler	185
11—Copy of letter dated June 14, 1962, to The Honorable Theodore Levin from Milton J. Trumbauer, Jr.	188
12—Letter dated August 13, 1961, to General Counsel's Office, signed G. S. Goldhammer	195
13—Rough draft of interrogatories	241
14—Document entitled "Memorandum in Opposition to Claimant's Motion to Stay Further Proceedings or Extend Time to Answer Government's Interrogatories"	303

GOVERNMENT'S EXHIBIT NO. Page

1—Carbon copy of letter dated October 18, 1961, to General Counsel, signed G. S. Goldhammer 256

2—Memorandum dated November 29, 1961, to General Counsel's Office, signed G. S. Goldhammer 257

3—Document entitled "Additional Interrogatories" and covering letter dated February 3, 1961, to General Counsel from K. L. Milstead 282

4—Carbon copy of proposed indictment and covering letter dated June 13, 1962 287

5—Letter dated August 8, 1962, to Mr. Lawrence Gubow from Harold Shapiro, with attachments 295

[fol. 3] Detroit, Michigan
Wednesday, August 4, 1965
10:30 o'clock A.M.

THE CLERK: Case No. 40236, United States vs. Detroit Vital Foods, Inc., a corporation, Lelord Kordel, an individual, and Alfred Feldten, an individual. Parties ready, please.

MR. TRUMBAUER: The Government is ready, your Honor.

MR. FRIEND: Defendants ready, your Honor, on motion.

THE COURT: All right.

MR. TRUMBAUER: Before proceeding, your Honor, I believe this is the first time in this case that Mr. Walter Byerley has been in court on a motion, and I know that the Court is familiar with Mr. Byerley, having dealt with him on previous cases, but he is not a regular—

THE COURT: I haven't any memory of that, but maybe I should have. I know Mr. Byerley looks familiar, but I don't recall what cases he has been in on.

MR. TRUMBAUER: Mr. Byerley is associated with the office of the General Counsel of the Department of Health, Education & Welfare, and he is a member of the district bar of Texas.

[fol. 4] THE COURT: Of what bar?

MR. TRUMBAUER: Of the district bar of the State of Texas, or the district of Texas.

MR. BYERLEY: The State of Texas Bar, your Honor.

MR. TRUMBAUER: The State of Texas Bar, and also a member of the District of Columbia.

THE COURT: You are a member of the bar of State of Texas; is that right?

MR. BYERLEY: Yes.

THE COURT: And have you been admitted to practice in any federal court?

MR. BYERLEY: In the Northern District of Oklahoma, your Honor.

THE COURT: The Northern District of Texas?
MR. BYERLEY: Of Oklahoma.
THE COURT: Oh, of Oklahoma.
MR. BYERLEY: Yes.
THE COURT: All right.
MR. TRUMBAUER: So that I would ask that Mr. Byerley be admitted to this court for the purposes of any motions and the trial of this matter, your Honor.
THE COURT: I would be very happy to grant that motion, Mr. Byerley. You are admitted to practice for that purpose.
MR. BYERLEY: Thank you, your Honor.
[fol. 5] MR. FRIEND: If your Honor please, with reference to the Government's motion that was made returnable this morning to quash the subpoenas which we had served, we received them in New York yesterday, and I prepared an answering affidavit just before—
THE COURT: —I have read the affidavit.
MR. FRIEND: However, the point I want to make, sir, is that this morning when I came in, the Government handed me—wanted to hand me—six or seven additional affidavits which I have never seen before, and I refused to accept them and told the Government that I would want to bring to the attention of the Court the fact that I had not received these papers, had not read them, and had had no opportunity to submit any responses thereto; and that I therefore thought that his Honor should not receive or consider those affidavits without affording me an opportunity to respond, if your Honor thinks that such opportunity—
THE COURT: Have the affidavits been filed?
MR. TRUMBAUER: Yes, your Honor. I filed—
THE COURT: When were they filed?
MR. TRUMBAUER: Yesterday afternoon.
THE COURT: They haven't come to my attention, either.
MR. TRUMBAUER: They were filed with the Clerk of the Court yesterday afternoon.
[fol. 6] THE COURT: The only affidavits I have seen are the two affidavits—I think there were two affidavits—that accompanied the Government motion to quash, and why were not these other affidavits filed at that time?

MR. TRUMBAUER: Because of the practical difficulties of time, your Honor, in getting that many affidavits together in response to the subpoenas. Of course, the subpoenas were served upon these gentlemen, I believe, on Friday. Is that correct, Mr. Byerley?

THE COURT: Last week?

MR. BYERLEY: Yes, sir.

MR. FRIEND: Yes, sir.

MR. TRUMBAUER: Last Friday.

THE COURT: Well, I can see that might be a good reason why the affidavits had not been filed earlier. But I think that I will permit the filing of the affidavits, but that if the contents are such that the defendants should have an opportunity to respond with other affidavits, I will grant that privilege and that right to the defendants.

MR. FRIEND: All right, sir.

May I then have a copy, Mr. Trumbauer?

MR. TRUMBAUER: I will at this time hand to counsel the following affidavits: affidavit of C. R. Lasham, affidavit of Morris L. Yakowitz, affidavit of K. R. Lennington, affidavit of George P. Larrick, affidavit of George [fol. 7] T. Daughters; and also a copy of the points and authorities in support of the Government's motion to quash the subpoenas duces tecum, a copy of which was, I believe, delivered to the Court's clerk yesterday, or the original of which.

THE COURT: Let the record show that on March 22, 1965, the defendants filed a motion to suppress any evidence or leads obtained therefrom by the Government in discovery proceedings instituted by the Government in Civil Case No. 20215 in this court, on the ground that the use of such evidence or information derived therefrom in this criminal case violated certain rights of the defendants; and, in the alternative, that motion asked for a hearing, by reason of the decision of the Supreme Court in the case of Abel v. United States, reported in 362 U.S. 217, to determine whether the Government acted in good faith in filing the civil suit and certain interrogatories in that case.

This Court conducted a hearing on this motion, and after reviewing the briefs of the parties and listening to

the oral arguments, the Court denied the defendants' motion to suppress, but did grant the request of the defendants for a hearing to determine whether the Government was proceeding in good faith when it filed the interrogatories in the civil suit. Subsequently an order was entered pursuant to the written opinion of the Court.

That hearing to determine the issue of good faith [fol. 8] was set for this date. On August 2, 1965, which is the day before yesterday, the Government filed a motion to quash subpoenas duces tecum, and the Court informed Mr. Trumbauer, of the United States Attorney's office, who consulted with the Court with respect to an opportunity to argue the motion to quash the subpoenas, that this motion would be considered before proceeding with the good faith hearing.

The motion to quash also contains or has attached to it two affidavits, and Mr. Friend, attorney for the defendants, has on this date filed an affidavit in opposition to the motion to quash.

I have read the motion, the affidavits, and a brief submitted by the Government which was delivered to my office yesterday. I have not yet read, of course, the affidavits the Government proposes to use—that is, the affidavits which Mr. Friend objected to at the outset of this hearing, and which I have already stated I will permit the Government to file and read in evidence in this case. But I have already stated that I will grant defendants an opportunity to respond to the matter therein set forth.

I have before me here the original of the subpoena, which we just procured from the Clerk's office this morning. So therefore, before proceeding with the good faith hearing which the Court granted at the request of the [fol. 9] defendants, I will listen to arguments now on this motion to quash the subpoenas.

Mr. Trumbauer?

MR. TRUMBAUER: Does the Court wish to examine the affidavits which Mr. Friend has just received?

THE COURT: Well, how many affidavits are there?

MR. TRUMBAUER: There were five, your Honor. These were the affidavits of the persons to which we referred in our motion to quash subpoenas duces tecum.

THE COURT: Do you have affidavits from each of those persons?

MR. TRUMBAUER: Each of those persons.

THE COURT: Are they similar in content or not?

MR. TRUMBAUER: Basically, they are similar in content.

THE COURT: What do they, in effect, state?

MR. TRUMBAUER: In effect, each of them states that they do not have any personal knowledge of the case, and particularly the issues that are before this Court at this time.

THE COURT: They have no personal knowledge of what?

MR. TRUMBAUER: That they have no personal knowledge—

THE COURT: Let me see them.

MR. TRUMBAUER: Yes.

[fol. 10] THE COURT: Do you have the originals?

MR. TRUMBAUER: I believe Mrs.—

THE COURT: Oh, here are the originals.

Do you have copies, Mr. Friend?

MR. FRIEND: Yes, sir.

THE COURT: Well, now, where are these witnesses?

MR. TRUMBAUER: Mr. Daughters, George Daughters, is located here in Detroit, your Honor. All of the other witnesses are connected with the Food & Drug Administration in Washington, and they are presently in Washington. However, they are on call in the event that the Court should decide that these witnesses—

THE COURT: Now, you are referring to Mr. Larrick, L-a-r-r-i-c-k, the Commissioner?

MR. TRUMBAUER: That's correct.

THE COURT: Mr. Lasham, L-a-s-h-a-m, Director of the Division of General Services of the Food & Drug Administration?

MR. TRUMBAUER: That is correct.

THE COURT: Mr. Lennington, L-e-n-n-i-n-g-t-o-n, who is Assistant to the Director for Regulatory Operations in the Bureau of Regulatory Compliance, et cetera?

MR. TRUMBAUER: That's correct.

THE COURT: And Mr. Yakowitz, Y-a-k-o-w-i-t-z, Director of a Division of Case Supervision, et cetera?

[fol. 11] MR. TRUMBAUER: Correct.

THE COURT: Those are the four men who are in Washington?

MR. TRUMBAUER: Right.

THE COURT: Now, are their affidavits similar in content, those four affidavits?

MR. TRUMBAUER: Yes. They will vary in some of the details, but their basic affidavit is that they don't have any personal knowledge of the facts involved in the case; that their relationship to the case was in some cases merely because of the fact that they occupied a position as Director—

THE COURT: I wonder if I might proceed first of all to listen to the oral arguments on this matter, aside from the content of these affidavits here in question, and see if a solution to this problem may be worked out. I think that is what I will do. I think I will just proceed first of all to listen to oral arguments on the motion to quash, and you may even use the affidavits of the individuals who have been subpoenaed and are involved in the motion to quash.

You may proceed with the arguments on the motion to quash.

MR. BYERLEY: Your Honor, these subpoenas duces tecum were served on last Thursday or Friday. A week prior to that time there had been a telephone conversation [fol. 12] between Mr. Friend and myself concerning the hearing and the persons who would be necessary to testify to the filing of the interrogatories in the civil case.

I at that time gave Mr. Friend the names of the people who could give this Court the facts as to the filing of the interrogatories so that this Court could determine the issue of good faith.

Mr. Friend said that he intended to subpoena Commissioner Larrick, as well as the rest of these men that have been subpoenaed, and some additional ones whom he eventually did not subpoena. I told him these people had no knowledge of anything relevant to this hearing and, in fact, of anything relevant to the case, which is essen-

tially what their affidavits state. They occupy positions of authority and as such they may have signed their names to certain correspondence. This does not mean that they have any personal familiarity with anything in this case.

The people who do have personal familiarity with the case, both cases, both the civil and the criminal case, and particularly familiarity with the filing of the interrogatories in the civil case, are here in court, are prepared to give this Court the facts, to undergo examination and cross-examination to the extent that this Court may determine the issue before it on the motion of good faith. [fol. 13] Due to this, and due to the fact that these people do not have any relevant information to give the Court, we have moved to quash their subpoenas. We have also moved to quash them on the basis that these persons, if they have any knowledge at all, have it only because of the records of the administration, which they may or may not have reviewed and may have come to their attention briefly. One of them, Mr. Lasham, is solely the custodian of the records.

THE COURT: He what?

MR. BYERLEY: He is the custodian of the records. He is the, so to speak, head record keeper of the Food & Drug Administration. I would venture to say he has never seen a single file on this case, or if he has, it hasn't been opened. He has no knowledge of what is in those files.

THE COURT: Well, I suppose the only reason they want him is to bring the records.

MR. BYERLEY: Very well, your Honor. Apparently this may be why they want to bring some of the other people also, is so that they may produce the records.

We then go to the second part of our motion to quash these subpoenas, which is directed to the records themselves.

These records as called for in the subpoena duces tecum should not be produced before this Court on this motion this morning. They are not relevant to this hearing in the [fol. 14] largest part, and even those which are relevant I think need not be produced, since the testimony can be

given which will cover the matters in the record so far as relevant to this hearing.

These records are confidential records of the Administration. They are protected by administrative regulation. The persons directed to produced them are not allowed to produce them except under certain circumstances; and for this reason they should be quashed. The information will be given to this Court upon an examination and cross-examination. We are not trying to deny anybody the information. We do not feel that the records need to be subpoenaed in order to provide this information.

Lastly, we think that the subpoenas duces tecum are entirely too broad. We think that they are not specific enough when they—

THE COURT: I disagree with that. There is no use in arguing that point. I have read the subpoenas, and I don't think they are too broad. I think they are specific enough.

MR. BYERLEY: Very well, your Honor.

THE COURT: I will decide that right now, that much of it.

MR. BYERLEY: As far as the remainder of it goes, then, I will simply reiterate that we have filed the affidavits of these persons, who state they have no personal [fol. 15] knowledge and can give no relevant testimony, so we move to quash the subpoenas as to them entirely, under the case of Overholser v. DeMarcos, which says that—

THE COURT: What case is that? Overholser?

MR. BYERLEY: Overholser.

THE COURT: O-v-e-r-h-o-l-s-e-r?

MR. BYERLEY: Yes, sir.

THE COURT: What does that case hold?

MR. BYERLEY: That case holds, your Honor, that where a witness—

THE COURT: Let's see, now. That is 149 F.2d 23; is that right?

MR. BYERLEY: Yes, sir.

THE COURT: Now, what does that hold?

MR. BYERLEY: That holds that where a witness who is subpoenaed to a case makes a showing that he has

no relevant testimony to give to the Court, it then becomes incumbent upon the person who issued the subpoena to show the reason why he should be called in. If the person who issued the subpoena cannot show any good cause for calling him in, then the subpoena should be quashed as to that witness, because there is no sense of requiring him to take the time and effort to come, particularly where he is an official who has other duties which hold him to an office, and taking time out from these other duties to go [fol. 16] off and simply say, "I don't know anything," is a waste of everybody's time.

So as to such person, when he has made a showing as these people have made upon their affidavits, that they have no relevant testimony, the subpoenas should be quashed unless the party issuing the subpoena comes up with some evidence as to what they can testify to.

There are similar holdings cited in our points and authorities—the Moffett case v. Arabian American Oil Co.—that's in 8 F.R.D. 566—and May v. United States, 175 F.2d 994.

Finally, your Honor, I think that the subpoenas themselves deomonstrate not quite the good faith that might be expected of the moving party in this motion. He has alleged that the Government is in bad faith in filing the interrogatories. One would expect that he would come in in entirely good faith in his side of the motion.

Now, the subpoenas go far beyond this Court's order. This Court ordered a hearing set down as to the Government's motive in filing the interrogatories. These subpoenas, by their terms, call—

THE COURT: That was about what I ordered, at least in my opinion. I don't know what the order itself provided. I don't seem to have that here.

Do counsel have a copy of the order that was made pursuant to the decision?

MR. FRIEND: Yes, sir.

[fol. 17] THE COURT: May I see that, please?

(Document handed to the Court by Mr. Friend.)

MR. BYERLEY: This is the order, your Honor (handing document to the Court).

MR. FRIEND: A single sheet would be more convenient.

THE COURT: My order is to this effect: That a hearing be held as set forth in the Memorandum Opinion of the Court. In the Memorandum Opinion of the Court, I refer to the Abel case. In other words, it was my intention to order a hearing in accordance with the Abel decision, and I did. I note here that I did restrict it or order the following:

> "In order to determine whether the Government was proceeding in good faith when it filed the interrogatories, a hearing as requested by defendants must be held."

The Abel decision, I think, even goes farther than that. In that case, of course, it was a deportation proceeding and a search made and a criminal prosecution followed, but the Court in Abel, in what I considered the significant language, stated:

> "The test is whether the decision to proceed administratively toward deportation was influenced by, and was carried out for, the purpose of amassing evidence in the prosecution for crime."

[fol. 18] And in my opinion I did say this on page 6:

> "If, in fact, the decision to institute the civil action and to file interrogatories 'was influenced by, and was carried out for, a purpose of amassing evidence in the prosecution for crime', within the language of the test as announced in the *Abel* case, then evidence procured by admissions in answer to the interrogatories must be suppressed."

Now, I think that even though my opinion does seem to limit the matter here to whether the Government was proceeding in good faith when it filed the interrogatories, I really think that, in view of what I said earlier, the hearing should encompass the entire civil case—at least the filing of the civil case as well as the filing of the interrogatories.

MR. BYERLEY: Very well, your Honor.

THE COURT: Those are the two main things.

MR. BYERLEY: Even so, their subpoena still calls for three categories of documents, of which only one is relevant even under your Honor's latest ruling. That would be (c). They call for documents relating to the decision of the Food & Drug Administration to institute the civil action, and the service of written interrogatories [fol. 19] and supplemental written interrogatories. That is certainly within your Honor's ruling.

(a) and (b) are not. They call for all memoranda and documents relating to the decision by the Food & Drug Administration to issue and the issuance of notices of hearing in the criminal case.

THE COURT: Well, but how can I decide the one without the other? Wouldn't any evidence of the decision to give this notice preliminary to the institution of a criminal prosecution and the decision to refer the matter for criminal prosecution, wouldn't that be relevant to whether or not the civil proceedings were used for that purpose?

MR. BYERLEY: Your Honor, I cannot see how.

THE COURT: Oh, I think so. I think I will decide that right now, too. There isn't any use of me listening to arguments on that.

MR. BYERLEY: Very well.

Well, your Honor, I also have before me a trade magazine or a newspaper, and it is entitled "The Food, Drug, and Cosmetic Reports," published by a Washington publishing company, which in the issue of June 21, 1965, has a story which could only have emanated from counsel for defendants.

THE COURT: Wait a minute. What is that again, please?

MR. BYERLEY: It is entitled "The Food, Drug, and [fol. 20] Cosmetic Reports." It is a trade newspaper for the food, drug, and cosmetic industries.

THE COURT: Yes.

MR. BYERLEY: It carries a story which could only have emanated from counsel for defendants in this case, and which I think goes along in showing their bad faith in pursuing this motion. I would like to present it to the Court for the Court's perusal.

THE COURT: Well, how many pages is it?

MR. BYERLEY: It is only about half a page in the center of this page, your Honor. It is one short news story in this entire pamphlet.

THE COURT: Let me see it.

(Document handed to the Court by Mr. Byerley.)

THE COURT: Why are you showing me this, for what purpose?

MR. BYERLEY: To show you, your Honor, I believe that this is an avowed intention on the part of the attorneys in this case to quote "expose how FDA operates."

THE COURT: To do what?

MR. BYERLEY: To expose how FDA operates, which is what they say they are going to do.

THE COURT: Oh, I'm not going to use something like this. I'm not even going to consider it. This is just some trade bulletin, isn't it?

[fol. 21] MR. BYERLEY: Yes, sir.

THE COURT: I know what went on in the hearing in this case, and I have read Judge Levin's decision and the Court of Appeals' decision, and I am reasonably familiar with what happened in the civil case and I know what happened here, and I'm not going to be bound by what some trade magazine or publication characterized it and what conclusions they have drawn.

MR. BYERLEY: Very well, your Honor. That concludes my argument.

MR. FRIEND: If your Honor pleases, I don't know how much there is to add to the points made, in view of the fact that your Honor has already ruled upon and rejected most of the points that they have made as to why they should be excused from responding to the subpoenas. There are two points, however, that I think should have clarification, and that is the question as to the conversation that I had with Mr. Byerley last week.

I had been in touch with Mr. Trumbauer about three weeks ago, telling him that this hearing would be on very shortly, and that we should be prepared to have available the persons who have knowledge of not only the decision to file the civil case, but the decision to send out

the notice of hearing and to refer the matter to Justice for criminal prosecution.

[fol. 22] He said to me that as he understood the procedure, since this was a court-ordered hearing, they were going to bring the people down that they thought had such information, and if there was anyone else whom I thought I would like, I should disclose that information to Mr. Byerley, who was more familiar with the matter than he was, and that he was sure something could be worked out. He told me that Mr. Byerley would call me.

Now, I waited for two to three weeks for Mr. Byerley to call me, and he did not. I thereupon called him. He was out. I called him several times, and finally I spoke to his associate, Mr. Alvin Gottlieb, whom we also tried to subpoena but who was suddenly left on vacation, and Mr. Gottlieb's first remarks to me were—and I feel since the issue is one of good faith and my alleged good faith is placed in issue, I think your Honor should know this:

Before I got through giving Mr. Gottlieb the usual greetings and salutations, he said, "I don't intend to help or make it easy for you fellows or for the defendants in this case. Anybody that you want, you are going to have to subpoena."

I said, "Mr. Gottlieb, it has been my understanding that I was to let you know who we wanted and you would make them available."

He said, "Well, you had better speak to Mr. Byerley about it. I will give him your message."

[fol. 23] The next morning Mr. Byerley called me, and this is the conversation to which Mr. Byerley has made reference.

I said to Mr. Byerley I wanted Mr. Larrick, I wanted Mr. Yakowitz, and the other gentlemen whose names I mentioned, and I told him why; that as I read your Honor's order and decision, it was clear that we had a right to inquire into the decisions that were made and taken with respect to the two cases. I wasn't interested in prying into their evidence, into the material that they had, at all.

Mr. Byerley said, "Now, you don't read the case right.

You are only entitled to ask questions about why I filed these interrogatories."

I said, "Ed, that's not the way I read it. You are perverting the letter and spirit of the Judge's order. I argued the case and I know what his Honor said."

He said, "Well, that's all I'm going to bring. If you want anybody else, you will have to subpoena them."

I said, "Well, what about you, Ed; are you going to be here?"

He said, "I'm going to be here and I'm going to testify, but you are going to have to subpoena me, too."

I said, "Now, wait a moment. I have been practicing in the federal courts for eighteen years, and this is the first time I ever heard an attorney for the Government tell me that he is going to be here anyway and testify, [fol. 24] but that I will have to subpoena him so I could pay his fare out here." I said, "When I call you as a witness, Mr. Byerley, you tell that to the Judge. If the Judge excuses you, fine."

So as far as the impression created by Mr. Gottlieb and Mr. Byerley that I sought to subpoena these other gentlemen not for the purpose of obtaining necessary information, but to harass them or embarrass them or expose them, that is absolutely untrue. It was my understanding that the purpose of the hearing was to inquire into the good faith of the Government, and the only way I could inquire into such good faith and that your Honor could have all the facts was not to limit it to the single question that Mr. Byerley said I could ask him, "Why did you file the interrogatories," and his answer would be, "To use them in the civil case," and that would be the end of the hearing. Obviously that isn't what your Honor meant and that isn't what the Abel case says. I subpoenaed those people because I believe they have the information, or if they don't have it, they can tell us who does.

Now, they say we haven't made a showing that these people do have the information. Well, I think the showing has already been made by their own papers, your Honor, and even those that they just handed in to you this morning.

Firstly, it was Mr. Daughters, who is right here in Detroit, who signed the notices of hearing. In that notice [fol. 25] of hearing he said that their investigation discloses the defendants' criminal responsibility for violation of the Act, and that if the defendants do not respond to the notice of hearing, as they have every right to do, the decision as to whether they matter will be referred to the Department of Justice for criminal action will be made with the evidence on hand.

Now, obviously when Mr. Daughters signed that statement he had some knowledge—

THE COURT: Now, wait a minute. What was the statement he made, you say?

MR. FRIEND: It is right in the notice of hearing. He said their investigation discloses our criminal responsibility.

THE COURT: Where does that appear, in your motion or in your affidavit?

MR. FRIEND: Not in the affidavit I have just handed up, but in the motion that we made originally to suppress, and I have it here, sir.

THE COURT: Well, I have that here somewhere.

MR. FRIEND: Your Honor, I think I might have incorporated it by reference. I believe I incorporated it by reference in the motion to suppress, in view of the fact that it was part of the civil seizure case, and I didn't want to attach the entire file in the civil case to my motion.

[fol. 26] THE COURT: Now, what have you handed me here? What is this?

MR. FRIEND: This is the exhibit that was incorporated by reference into the motion.

THE COURT: The original motion?

MR. FRIEND: Yes, sir. And it was incorporated not only in the original motion, but in the motion in this court to suppress. There were two motions, one before Judge Levin and one before you, sir. That exhibit is part of both motions, and right at the very beginning—

THE COURT: This is a communication from Mr. Daughters, one of the witnesses subpoenaed here, to the defendants; is that right?

MR. FRIEND: Yes, sir. And your Honor can't see the date—

THE COURT: This is the communication of January, is it?

MR. FRIEND: January 19, 1961.

THE COURT: I am looking for the date on it here.

MR. FRIEND: Your Honor, the date is obliterated there. The photocopy did not take too well. But it was on or about January 19th, and there isn't any question about that.

THE COURT: I think that was in the evidence in connection with the motion to suppress.

MR. FRIEND: Yes, sir.

[fol. 27] THE COURT: I remember that date in connection with my decision. I think I referred to that.

MR. FRIEND: Yes, sir.

THE COURT: In other words, this is the notice under 21 USC 335, is it?

MR. FRIEND: Exactly, sir, that's it.

THE COURT: Well, I would think as to Mr. Daughters, first of all, he is here in Detroit; and secondly, that the mere fact that he was the author of this notice, made the notice of this preliminary hearing under Section 335, Title 21, that he would be a proper witness. I am going to deny the motion to quash as to the witness Daughters.

Now, that leaves us what, four other witnesses, the Washington men?

MR. FRIEND: Yes, sir. Now, let's turn next to Mr. Lasham, C. R. Lasham, whose affidavit I have just had handed to me a few moments ago and which I have just read.

Your Honor, we subpoenaed Mr. Lasham not because we wanted him to testify from personal knowledge as to what happened, but because from my knowledge of the workings of this particular agent, I know that Mr. Lasham is the custodian of the records.

THE COURT: Mr. who?

MR. FRIEND: Mr. Lasham.

THE COURT: He what?

[fol. 28] MR. FRIEND: He is the custodian of the FDA records.

THE COURT: Well, now, supposing that the records are produced. It wouldn't be necessary that he personally be here, would it?

MR. FRIEND: Correct, sir. I have no objection. They can produce them through any subordinate employee they care to.

THE COURT: All right. Let's go on to the other three, then.

MR. FRIEND: Apropos that, your Honor, their affidavit says that he is the custodian—

THE COURT: Whose affidavit?

MR. FRIEND: Mr. Lasham; that he is the custodian of certain records which do pertain to these cases.

THE COURT: Well, he says records that pertain to the case.

MR. FRIEND: To the cases.

THE COURT: To such cases. He says he has no personal knowledge of the matters contained in the files.

MR. FRIEND: Yes, sir. I'm not interested in his personal knowledge, because I know that he doesn't have any. I just wanted the records, and the only way I know how to get them is to subpoena them.

THE COURT: Now, let's look at the other three [fol. 29] here. That's Mr. Larrick, the Commissioner, and the deputy—or no. That leaves three, the Commissioner, the Director of the Division of Case Supervision, and the Director of Regulatory Operations.

MR. FRIEND: Yes, sir. Now, let's take Mr. Yakowitz next.

Mr. Yakowitz is the Director of the Division of Case Supervision.

Now, I, your Honor, just didn't pull Mr. Yakowitz out of a hat. I know that Mr. Yakowitz, as the Director of the Division of Case Supervision, does exactly what his title says, namely, supervise the cases, both civil and criminal. What he doesn't know about the agency's operations with respect to these cases he can tell us who does know. His affidavit doesn't say that he has no knowledge. He just said he didn't prepare the individual cases. Well, naturally he didn't prepare the individual cases, but that doesn't mean he doesn't have knowledge of how they came

to begin and what steps were taken by the agency to initiate these cases.

Not only that, he states in his affidavit—and this I take serious exception to, your Honor, because it underscores what I believe is an attempt to conceal from your Honor the facts. He says in his affidavit in paragraph 3 that he was informed that the purpose of the hearing—and I'm not quoting—is to "inquire into the Government's good [fol. 30] faith in serving the written interrogatories in the related case."

THE COURT: Now, wait a minute. Where is that?

MR. FRIEND: At the bottom of page 3.

THE COURT: Page 3 of what?

MR. FRIEND: The bottom of paragraph 3 of the first page of his affidavit, sir.

THE COURT: Are you referring to Yakowitz?

MR. FRIEND: Yes, sir.

THE COURT: Yes. All right.

MR. FRIEND: Now, you see, sir, all of these affidavits start off with the premise that the only scope of the inquiry is with respect to the service of the written interrogatories. Naturally, the written interrogatories, their actual preparation is done by Mr. Byerley in Washington. They aren't even done here, as we will show, your Honor, at the time of the hearing. It all comes out of Washington, the legal department.

But the use that is made of the answers to the interrogatories, the decision to initiate the notice of hearing, the decision to bring a civil case at the very same time that they are contemplating a criminal action is not made by Mr. Byerley; it's made in the Division of Case Supervision. That's where it is made.

Now, this, it seemed to me, was a very logical place to start. The way we structured this out, sir, was we [fol. 31] would have started with Mr. Daughters, who got the file from Washington when he sent out the notice of hearing. We would have traced it back to the Division of Case Supervision, which is Mr. Yakowitz's section. We would have—

THE COURT: He said the civil case was instituted before he became Director of the Division of Case Super-

vision, and the only knowledge that he has of the case is derived from hearsay and a perusal of the files.

MR. FRIEND: Well, your Honor, I don't know what that means, and I believe that this is an attempt to use semantics to avoid the issue.

Of course it is derived from hearsay in the sense that his employees must have told it to him. In other words, we are not only entitled to get the man who actually went out into the field and did the work. Mr. Yakowitz is the supervisor of that agency. He supervises and manages the personnel in his division who prepare, develop and assist in the prosecution of cases. He says that right at the top of paragraph 4.

THE COURT: He goes on further to say, "I have not in my official capacity reviewed or examined any reports or records concerning the case."

Now, if he hasn't done that, how could he be of any benefit to the defendants?

MR. FRIEND: Your Honor, he would know—

MR. TRUMBAUER: May I be heard on this point, [fol. 32] your Honor?

THE COURT: Just a moment.

MR. FRIEND: He would know who did, sir. He would know who does have such knowledge.

Now, if they do not have knowledge, I am not anxious to spend the money, as I have already done, to bring these people in from Washington and take up a lot of their time and your Honor's time.

I only want to have the people who have knowledge of the issues which your Honor has framed.

Now, the difficulty I had with Mr. Byerley was that he limited the issue to the interrogatories. That's the point. If he will tell your Honor, "All right, sir, I will tell you who has knowledge of the other matters"—

THE COURT: Well, he might have been misled by my decision to some extent. It was a little bit misleading, I think.

But I certainly feel that the good faith issue involves the institution of the civil suit, the interrogatories made, and the institution of the criminal proceeding—all three of those matters.

MR. FRIEND: Yes, sir. That's the point.

THE COURT: Now, I certainly shall grant the defendants the right to have a hearing on those matters, all of which I consider are within the scope of Abel, the [fol. 33] Abel case. In order to determine this issue of good faith in the bringing of the criminal prosecution, I think I have to take into consideration the time, the chronological order of these events, and also what was done and who made the decisions and why those decisions were made.

Now, who may know that, I don't know. I want to first of all say that I would be very much opposed to requiring any Government official to leave his work and come here at some great distance to testify to something concerning which he has no personal knowledge.

On the other hand, even though it may involve time and inconvenience, if any person—I don't care who he is—does have some knowledge, you are entitled to have it as bearing upon the issue here, the good faith issue.

MR. FRIEND: Sir, I would withdraw my subpoenas if they would state and represent to your Honor that they will produce all of the persons who have knowledge of the very matters which you have been referring to, sir. I'm not interested in harassing anybody. It cost us almost a thousand dollars to subpoena these people.

THE COURT: I can see that each one of these men from Washington gets $108 in attendance.

MR. FRIEND: That's right.

MR. TRUMBAUER: May I be heard, your Honor?

THE COURT: Yes.

[fol. 34] MR. TRUMBAUER: With regard to Mr. Yakowitz, Mr. Josh Randolph, whose affidavit appears in connection with our original motion, is the man—and we have made him available; he is in court here—is the man in that very Division of Case Supervision who did all the basic work on both the preparation of the civil case and the bringing together of the various records. He has the knowledge, as far as the Division of Case Supervision is concerned. He is the man who did all the work. It was first assigned to him.

THE COURT: Yes, Mr. Trumbauer, he may have done the work, but that doesn't mean that he made the ultimate decision on these things. You never know—I don't—where those decisions are made in the Government hierarchy—whether the top man makes them or some subordinate.

MR. TRUMBAUER: Right. But what I am driving at is perhaps the Court could defer its decision on Mr. Yakowitz.

THE COURT: Well, I was just about to suggest that, Mr. Friend. Suppose we proceed with the witnesses here, and then you decide whether, after listening to the testimony, you want any of these other persons you have subpoenaed. I will listen to further arguments on that, and I will decide then whether the subpoenas should be quashed, and if not, give you an opportunity to have them. Would that be satisfactory?

MR. FRIEND: Your Honor, does that also refer to Mr. Daughters? Because I think Mr. Daughters—

[fol. 35] THE COURT: No. I have ordered Mr. Daughters. I have denied the motion to quash the subpoena as to him.

MR. FRIEND: And, sir, how about the records that pertain to this very question?

THE COURT: Well, now, that's another thing. I am glad you brought that up, because I intended to say something about that.

Can't we, Mr. Trumbauer and Mr. Byerley, have the records—if we have the records that pertain to any decision concerning both the civil and criminal cases—No. 1, the institution of the civil case, the filing of these interrogatories, the decision on the filing of this notice under Section 335, and the recommendation to the Department of Justice for criminal prosecution.

Now, I would think, if I have the power, I am going to order all documents and records pertaining to those four matters be produced.

MR. BYERLEY: May I be heard, your Honor?

THE COURT: I don't know how I can possibly decide this good faith question without that.

MR. BYERLEY: May I be heard on that, your Honor?

THE COURT: Yes.

MR. BYERLEY: May I suggest that if the Court does make such an order, that the Court restrict it to the Court's in camera inspection, and not allow—

[fol. 36] THE COURT: Be restricted to what?

MR. BYERLEY: To the Court's in camera inspection, and not allow them to be seen by the defense?

THE COURT: I don't hear you at all. What was that again, be restricted to what?

MR. BYERLEY: To an in camera inspection by the Court, and not to an inspection by the defense.

THE COURT: Well, would that be satisfactory, Mr. Friend?

MR. FRIEND: Well, no, it would not, your Honor, for this reason: they state that we are seeking to rummage through their files and to conduct, in effect, a pretrial discovery in a criminal case. We are not seeking to do that.

THE COURT: Well, I know that. That isn't the point involved here. The point is whether—

MR. FRIEND: Well, how can I use them, sir. That's the point. How can I use them on cross-examination? If Mr. X gets up on the stand and says something and there is an interoffice memorandum from Mr. X to Mr. Yakowitz or to Mr. Harold Shapiro, of the Department of Justice in Washington, who gets the matter initially, how can I possibly question the witness and interrogate him as to his credibility and what happened if I don't have access to the record?

I would do this, sir: I would certainly agree to keep the contents confidential.

[fol. 37] THE COURT: Well, I will tell you what I am going to do. I am going to grant this request for the time being.

Now, I may change my mind. If the Government has any records pertaining to these four matters that I have listed as being within the scope of this hearing, and if the Government, in submitting any one of those records—and I don't want the Government just to hand me a

bunch of records and say, "Inspect these in camera." If any record, in the opinion of the Government, contains confidential information that should not be brought to the attention of the defendants and would not be relevant here, the Government should so inform the Court and point out the precise matter which they claim would be confidential so that I am not burdened with a lot of useless in camera work. And then I will decide that issue, and I will hear from you further on that if you are not satisfied with the particular matter at that time.

MR. FRIEND: All right, sir.

Now, there is one other question, and that is this: When the matter was referred to the Department of Justice from Food & Drug with a recommendation, as your Honor has pointed out, undoubtedly somebody in authority makes the recommendation and made the decision.

The person who receives the recommendation in Justice is Harold Shapiro, the Assistant Attorney General in charge of criminal prosecutions from FDA and certain [fol. 38] other agencies. Harold Shapiro in turn sends the matter on to the district prosecutor, the U. S. Attorney, for follow-through.

Now, I had spoken to Mr. Trumbauer and I said, "It seems to me that Mr. Harold Shapiro is just the right man to have testimony," and he agreed with me. He said, "It sounds pretty reasonable."

When I spoke to Mr. Byerley in Washington and to Mr. Gottlieb, his associate, I said, "Why don't you bring Mr. Shapiro down? After all, if you turned a file over to him and you included in that file the very answers to the interrogatories, that's something the Judge ought to know about."

And he said, "Don't discuss that with me. We are not producing anybody for you voluntarily. If you want him, subpoena him."

Now, sir, I think that—

MR. TRUMBAUER: Now, I feel I should at this point answer that, your Honor.

THE COURT: All right.

MR. TRUMBAUER: Because he has referred to a telephone conversation with me.

THE COURT: All right.

MR. TRUMBAUER: I did originally agree with Mr. Friend on the matter of Mr. Shapiro, and then after reviewing the matter further, and Mr. Friend and I last week discussed this over the telephone—

[fol. 39] MR. FRIEND: You are right.

MR. TRUMBAUER: —I said, "I originally thought that Shapiro would be a proper witness, but now I see that Mr. Randolph can testify as to when the matter first went to Mr. Shapiro, and I can testify as to when it came from Shapiro. So between the two witnesses, we can fill that in."

And he said to the effect that, "I think you're right, Jack. That's probably true," or something along those lines.

THE COURT: Now, here. I think to save time, let us proceed with the hearing with the witnesses here available, and then I will take under advisement this motion to quash insofar as I have not yet disposed of that motion. I have disposed of a part of it.

MR. FRIEND: Sir, when would your Honor have those records that we were talking about, because I think the sooner we get them, the quicker we will be able to conclude the hearing.

THE COURT: What about that, Mr. Trumbauer? When could we have those records?

MR. TRUMBAUER: Yes, your Honor. I believe now, if I'm not mistaken, the Court has ordered production of those records.

THE COURT: Yes.

MR. TRUMBAUER: With respect to the four points [fol. 40] that are on the record.

THE COURT: That's right.

MR. TRUMBAUER: Due to the problem that we have with respect to 4.1 of the Code of Federal Regulations, your Honor, which does raise a problem with regard to the Court's order, may we—

THE COURT: If we have to contend with that, I don't know when we will get at the case now.

MR. TRUMBAUER: Well, what I would like to do is have an opportunity to discuss this with higher au-

thority in regard to this, and then come back to the Court.

THE COURT: All right. Now, how long would that take? Could you do it by phone?

MR. TRUMBAUER: Yes, we would be doing this by telephone. It is twelve-thirty in Washington now.

THE COURT: They are on Daylight Time there?

MR. TRUMBAUER: They are on Daylight Time.

MR. FRIEND: Yes, they are.

THE COURT: Why don't we take just a few minutes' recess and see what you can find out and let me know, and it may be that we will have to adjourn this until a little earlier in the afternoon to proceed with it.

But we will not adjourn for the noon hour for a few minutes. You will see what you can find out in Washington, will you, Mr. Trumbauer and let, me know?

[fol. 41] MR. TRUMBAUER: Yes.

(A recess was taken.)

THE COURT: What did you find out, Mr. Trumbauer?

MR. TRUMBAUER: Your Honor, we will make available the records of the Food and Drug Administration relative to the four points which the Court has already set forth upon the record.

THE COURT: When would those records be available?

MR. TRUMBAUER: We could be ready to proceed—we will have to go through some of them—but I think by perhaps two o'clock this afternoon.

THE COURT: Well, all right.

MR. TRUMBAUER: We want to be able to go through them to save a little time of the Court in deleting useless records or records which have no pertinence here, if that would be all right with the Court.

THE COURT: Yes, I think that is quite all right. Then there is nothing we can probably accomplish until then.

MR. TRUMBAUER: No, sir.

THE COURT: Do you think we might proceed with any testimony?

MR. TRUMBAUER: I really feel that in view of counsel's feelings on the matter and the Court's feelings on the matter, that we should have the records available [fol. 42] as the witness testifies.

THE COURT: All right. I think probably we will be met very early in the testimony with the request for the records, and therefore, I believe it would be more orderly and we would accomplish more if we would, say, recess this matter until two o'clock.

Now, I would like to talk with counsel in chambers a few minutes about the jury challenges for the case, the peremptory challenges in the criminal case next week. If I may, I would like to talk to counsel right now.

MR. TRUMBAUER: Very well.

(A recess was taken until two o'clock p.m. on the same day, Wednesday, August 4, 1965.)

[fol. 43] Detroit, Michigan
Wednesday, August 4, 1965
2:20 o'clock P.M.

(Court convened pursuant to the recess.)

THE COURT: Before I forget it, let the record show the Court did confer with counsel in chambers during the noon recess, immediately after the recess was taken, and I discussed with counsel two different matters: One, that of peremptory challenges to be exercised in connection with the trial of this case scheduled for next Tuesday morning, and also the matter of preparation and submitting requests to charge.

In this case there are three defendants, a corporate defendant and two individuals. All three defendants are

charged with the commission of certain offenses in the indictment. I believe there are now six counts remaining, are there, gentlemen?

MR. BYERLEY: Yes, your Honor.

THE COURT: As I recall it, there are Counts 4, 5, 8, 9, 10, and 11.

MR. BYERLEY: Yes, your Honor.

THE COURT: And the three defendants are charged jointly in each of the remaining six counts.

Under the rule, a defendant charged with a felony [fol. 44] is entitled to ten peremptory challenges, and a defendant charged with a misdemeanor is entitled to three; and Rule 24(b) in connection with peremptory challenges further provides:

> "If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly."

The corporate defendant in this case is charged with a misdemeanor. The individual defendant Lelord Kordel is charged with a felony—and when I say a felony, I am speaking with respect to all three defendants here on each of the six counts. The corporate defendant is charged with the commission of a misdemeanor; the defendant Kordel is charged with the commission of a felony; and the defendant Feldten is charged with the commission of a misdemeanor.

Such being the case, the Court discussed with counsel the matter of challenges in addition to the minimum number of ten to which the defendants individually or jointly would be entitled, and I have informed counsel for the Government and the defendants that I will allow the defendants a total of thirteen peremptory challenges. Now, these may be exercised individually or jointly, and I will allow the Government, and I think they are allowed only six peremptory challenges, in any event.

Now, as to the requests to charge, I discussed this [fol. 45] at some length with counsel, and it was mentioned that in view of the fact that the bill of particulars was not too specific in some instances, and in not knowing

exactly what the proof of the Government would consist of, and there being some question whether some matters are questions of fact or questions of law, counsel for the defendant, after I had first stated that I would like to have the requests to charge early in the trial, and I did suggest having the requests to charge submitted to the Court by the end of the court day on August 13th, counsel asked for a few additional days over the weekend, which I granted; and I will then ask and request that I have requests to charge in this case in my hands by the opening of court on August 17th, the trial of this case to commence August 10th.

Now, I would also like, gentlemen, in view of the statements that were made at the informal conference in chambers, it would be extremely helpful to the Court to have trial briefs covering what counsel might consider to be any unusual problems that might confront the Court. I am thinking specifically now of matters that might be questions of fact or questions of law.

Mr. Friend did mention one matter that he was contending would be a question of fact and he thinks the Government will contend is a question of law.

Now, the Court, of course, does not deal with this type of case from day to day, and it would be helpful to the [fol. 46] Court to have a trial brief on any features or aspects of the case that might be a problem.

All right. Now, are we ready to proceed with the hearing, gentlemen?

MR. BYERLEY: Yes, your Honor.

MR. TRUMBAUER: Yes, your Honor.

THE COURT: All right. You may proceed, then.

MR. FRIEND: Your Honor please, before proceeding, since you did refer, sir, to a question of how many counts there were left, your Honor will recall in chambers we talked about Counts 4 and 5, with respect to which we had made a prior motion which your Honor denied. Mr. Byerley had stated in chambers that as he recalled it, goods were located in one place in Count 4 and in another place in Count 5.

I have since read the brief and I have read your Honor's opinion again and the Government's Bill of Particu-

lars, and your Honor had ruled the reason you were denying our motion was that the crime was the misbranding, and not the holding for sale, and it therefore didn't matter where it was held for sale; it was the misbranding that constituted the crime.

Well, in the Government's Bill of Particulars, sir, the acts of misbranding which we asked them to specify they did specify, and they are absolutely identical. I am at a loss to see the difference in the acts of misbranding that are alleged to constitute the crime as between 4 and 5; [fol. 47] and I wonder, sir, since your Honor did express the preference to simplify, insofar as possible, the counts that are to be submitted, that if in fact they are the same, that it be eliminated from the case so that we do not have an extra count to contend with in what is obviously a rather complicated indictment.

THE COURT: Have you examined into that any further, Mr. Trumbauer?

MR. TRUMBAUER: I didn't have an opportunity over the noon hour, your Honor; and I wonder if the Court would take Mr. Friend's motion under advisement until tomorrow morning, to give myself an opportunity to review, as well as the Court.

THE COURT: Yes, all right.

Now, just a moment.

(Short interruption.)

THE COURT: All right. You may proceed, then, gentlemen.

MR. TRUMBAUER: Your Honor, there are present in the courtroom or near it Mr. George Daughters, in response to the subpoena of the defense counsel. Also present and available for testimony are Mr. Josh Randolph, Mr. Byerley, and myself, as well as Mr. Daughters' assistant, Mr. George Fowler, in the event that counsel, through the interrogation of other witnesses, may wish to call him.

So these witnesses are all available for counsel [fol. 48] to proceed with as he chooses.

THE COURT: I didn't hear all you said, I am frank to say.

MR. TRUMBAUER: These witnesses are available to proceed with as counsel chooses in the order that counsel chooses, defense counsel.

THE COURT: Mr. Friend?

MR. FRIEND: Well, your Honor, since this is a hearing rather than a trial, I don't think there is any question, as I see it, of burden of proof as to who goes forward first. I at one point had been under the impression that it would be the Government who would try to sustain their position that they acted in good faith. In suggesting that I go forward first, it would appear that I would have to establish that the Government acted in bad faith.

As I say, since I don't believe there is really any question of burden of proof, but only that your Honor have all of the facts concerning what actually happened, I would have no objection to calling the witness first, so long as I have not prejudiced myself and my position that we do not have the burden of proof as such; that this is a hearing to inquire into all of the relevant facts, and it doesn't really matter who calls whom first.

MR. TRUMBAUER: Your Honor, this is part of a motion to suppress evidence, and it is my understand of [fol. 49] the law that the party who brings the motion has the burden of proof; and we do not feel that we stand here and have the burden of proof that the Government acted in good faith. I think there is a considerable body of law on the proposition that on any type of motion to suppress evidence of illegal search and seizure, and so forth, that the burden of proof is on the other party, and generally we try to make the witnesses available in connection with that, but there is certainly no presumption here or no point of departure that the Government acted in bad faith. It is an inquiry, but it is still part of this motion to suppress. That's what the Court is really going to decide, whether to suppress this evidence or not.

THE COURT: Does the Abel case speak in terms of the burden?

MR. TRUMBAUER: The Abel case did not seem to cover that point, your Honor.

MR. FRIEND: I don't recall that at the Supreme Court level there was any discussion about that. I have

not read the District Court decision. Indeed, I don't know whether there actually is an opinion in the District Court.

THE COURT: Well, I won't rule on who has the burden at this time, but you may proceed with the testimony.

MR. FRIEND: All right, sir. We would call as the first witness Mr. George Daughters.

[fol. 50] GEORGE T. DAUGHTERS was called as a witness by the defendants, and, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. FRIEND

Q Mr. Daughters, would you state your full name and address, please.

A George T. Daughters. My address is 20475 Picadilly, Detroit.

Q Do you hold any position with the Food & Drug Administration?

A Yes, sir.

Q What is that position?

A Director, Detroit District, Food & Drug Administration.

Q And, sir, how long have you been the Director of the Detroit office of the Food & Drug Administration?

A Since it was opened in 1959.

Q Would you tell his Honor what your responsibilities and duties are as the Director of the Detroit FDA office.

A I have the general supervision, management and operation of the district in the enforcement of the various laws that the Food & Drug Administration is responsible for in the states of Michigan, Northern Judicial Districts of Ohio and Indiana.

Q Precisely, specifically, Mr. Daughters, what are your responsibilities with respect to the enforcement of the Federal Food, Drug & Cosmetic Act in Detroit?

A I have direction generally of the operations of the [fol. 50-A] inspectional staff, the laboratory staff and the clerical staff, who conduct investigations, collect official samples, make establishment inspections, check registrations, and other features of the law.

Q Do you have anything to do with the preparation of civil or criminal cases under the Food & Drug Act?

A Very little. Somewhat, yes, sir.

Q Well, would you tell his Honor just what it is that you do or that your office does in that connection?

MR. BYERLEY: I object, your Honor. Now, which question is he asking him? He asked him first what he did. Now he wants to know what his office did. Let him ask two different questions instead of one question simultaneously.

THE COURT: Well, I thought his question now was what his office did. I thought that was the question. He may answer.

A The office is responsible for the investigation, establishment inspection, sample collection, examination of samples, and reporting to our Washington offices whether or not there are apparent violations of the Food, Drug, and Cosmetic Act and other acts enforced by the group.

Q (By Mr. Friend) Do you have anything to do with the making of the decision as to whether, in the judgment of your district office, there is a violation of the civil or criminal sections of the Act?

A I do. After review of papers, documents, reports, [fol. 51] I will conclude that there is not a violation or that there may be a violation. If I conclude that there may be, I recommend to my superiors in Washington that there appears to be a violation, yes, sir.

Q So there is no misunderstanding about this, Mr. Daughters, it is you in the Detroit office who makes that recommendation?

A My assistant or I, yes, sir.

Q Did your office at any time make any investigation in connection with the filing of a criminal action against the defendants in this action?

A I couldn't answer that without referring to the file. I believe the answer is yes.

THE COURT: Wait a minute. What was that question, please? Read that back.

(The last question was read by the reporter.)

MR. BYERLEY: Your Honor, I don't think that's a proper question on this inquiry.

THE COURT: What?

MR. BYERLEY: I don't think that that's a proper question on this inquiry, and I move that both the question and the answer be stricken. We are concerned with the decision, not the investigation.

THE COURT: Objection overruled. It may stand.

Q (By Mr. Friend) Now, you referred to the fact that you might have to look at some records when you answered [fol. 52] my question. Would you describe for his Honor the type of records that you were referring to.

A In connection with what, sir?

Q In connection with the investigation which your office made to determine whether criminal proceedings would be brought against the defendants.

A Well, there are undoubtedly many such records. Now, the gentleman who would be most acquainted with those records would be my deputy, who is here.

Q Well, what records, Mr. Daughters, did you have in mind when you said that you might have to refer to some records on the question of the investigation?

A Well, there were here two or three simultaneous things going on, and this, of course, is going on recollection only.

Q What were the two or three things that were going on simultaneously Mr. Daughters?

A There were sample collections in connection with some merchandise being distributed by the defendants.

THE COURT: What was that again, please?

A Some samples collected that were being examined in connection with distribution by the defendants.

Now, the sequence of events here isn't clear in my mind. I haven't seen the file, and this is several years ago.

Q (By Mr. Friend) Well, if you can't recall, Mr. [fol. 53] Daughters, I have no objection if you would look at whatever records you need to look at to refresh your recollection, as to the three things that were going on simultaneously, and as to the sequence of events. Would

you be kind enough to produce those records so that I can have the benefit of your best recollection?

MR. BYERLEY: Your Honor, I object to the production of records of the sort vaguely described by Mr. Friend. The Court ruled this morning what records were available. We have told the Court that they will be made available, and we have the Court's ruling that the relevant records were those pertaining to the filing of the civil case, those pertaining to the filing—

THE COURT: Well, doesn't this fall within that?

MR. BYERLEY: No, sir, your Honor. The filing of the civil case, the decision to file the civil case, is not—

THE COURT: That wasn't what I limited it to. I also said the criminal case.

MR. BYERLEY: Yes, your Honor. But the decision to file the civil case, the decision to file interrogatories in the civil case, the decision to file the notice of hearing in the criminal case, and the decision to file the criminal case.

THE COURT: Doesn't this fall within that?

MR. BYERLEY: No, sir. We are in the area of investigative reports now, and I do not think that your Honor's ruling this morning covered investigative reports.

[fol. 54] THE COURT: No, the witness said he couldn't recall precisely about the recommendation made in regard to the criminal prosecution of these defendants without the records.

MR. BYERLEY: No, sir, your Honor.

THE COURT: Objection overruled.

Q (By Mr. Friend) Mr. Daughters, would you get the records?

MR. BYERLEY: On behalf of Mr. Daughters, I will respectfully state to the Court that the records that have been called for by Mr. Friend cannot be produced.

THE COURT: That they what?

MR. BYERLEY: That the records that Mr. Friend has described cannot be produced.

THE COURT: Why can't they?

MR. BYERLEY: Because of the instructions given in Regulation 4.1, issued by the Secretary of Health, Education & Welfare, your Honor. Mr. Daughters is under orders not to produce such records.

THE COURT: That he what? If you would speak up so I could hear you. I don't hear all you are saying.

MR. BYERLEY: Because of the regulation promulgated by the Secretary of Health, Education & Welfare, 21 CFR 4.1.

THE COURT: I thought we took that up this morning and that you were not relying on that.

Now, if you are, I told you this morning what the consequences might be: that if we are going to have to deal [fol. 55] with that regulation, we will have to deal with it and this case may go over. I don't know how long it will take to go through the procedure required by that regulation. It just seems to me that in view of the position taken here by the Government on the subpoenas duces tecum, that it would be an idle gesture almost to go through the requests for the Commissioner to make these records available.

MR. BYERLEY: Your Honor, I advised the Court this morning that the records which I at that time believed were encompassed within your order would be made available.

I will hand those to the Court at this time and allow him to examine them, and if you desire—

THE COURT: Well, now here. I have told you this morning, too, that I'm not going to take all the Government records—

MR. BYERLEY: No, sir.

THE COURT: —and start pawing through them.

Now, if there is any record that you claim, any precise record that is confidential or privileged that would make it inadmissible, I will view it in camera; but I'm not going to take a bunch of records and go in my office and attempt to do something like that.

Now, let's get down to business here.

MR. BYERLEY: Your Honor, these are the records which the Government will make available without further adieu.

[fol. 56] THE COURT: Well, are these records the records that have been requested here?

MR. BYERLEY: I don't know exactly what he has requested. This is part of my point.

THE COURT: Are these all the records that you are going to make available?

MR. BYERLEY: Yes, it is, your Honor.

THE COURT: Is there anything in those records that would be confidential or prejudicial?

MR. BYERLEY: No, your Honor. We will make these available to counsel. But what I am objecting to is making available to counsel the rest of our files.

THE COURT: All right. Make them available.

MR. FRIEND: Your Honor, I think that Mr. Byerley is going far afield on the particular question that I asked Mr. Daughters.

THE COURT: Well, these may be the records you want, I don't know; but you could show them to the witness—that's what I have in mind—and see if these are the records.

MR. BYERLEY: You will need records from the Detroit district office. I will get those.

That's the notice of hearing (handing document to Mr. Friend). That is the only record from the Detroit district office files that the Government will make available.

MR. FRIEND: Well, your Honor, Mr. Byerley has [fol. 57] given me a copy of the notice of hearing. We know from what this witness has just said that that isn't the record that I was referring to and it wasn't the record that Mr. Daughters was referring to.

THE COURT: Oh, no. That isn't it, is it?

MR. FRIEND: And when Mr. Byerley says this is the only record—

THE COURT: Well, show it to the witness and ask him if this is the record.

MR. FRIEND: Your Honor, may I finish the sentence. When Mr. Byerley says that this is the only one he will make available, he chooses his words carefully and does not say it is the only one which is available on this issue.

THE COURT: Yes, I understand.

MR. FRIEND: Would you mark this, please, for identification.

(A carbon copy of a notice of hearing dated January 19, 1961, and attached charge sheets, was marked Defendants' Exhibit 1 by the reporter.)

Q (By Mr. Friend) Mr. Daughters before we had this colloquy, you referred to the fact that you would have to check some records so that you could get the sequence of events with respect to three matters that were going on simultaneously in your office, and you mentioned the fact that samples were being collected.

[fol. 58] Now, I show you what has been marked as Defendants' Exhibit 1 for identification and ask you if that is the record or records to which you were referring in response to my question?

A This is in part. It is not the one relative to samples collected, but this is one of the latter papers that refers to this sequence of events.

THE COURT: That's a part of them?

A Yes.

THE COURT: What are the others? Are they here? Do you know whether the other records are here that you had in mind?

A I would hope so, yes, sir.

THE COURT: Will you make those available to the witness.

MR. BYERLEY: Your Honor, may we have some clarification from Mr. Friend as to precisely what he wants?

THE COURT: The witness is the one to decide, isn't he? I asked you if you would let the witness see. He said the records are here. Can't he look at them?

MR. BYERLEY: Your Honor, I respectfully submit to the Court that it would be a futile gesture to let the witness look at the records when he cannot testify from the records, any more than he can present the records to counsel. He is prohibited—

[fol. 59] THE COURT: I wonder if I have a right to draw an inference of good faith or bad faith from what is going on here? What do you think?

MR. BYERLEY: Your Honor—

THE COURT: Do you think I could dispose of this whole thing without going any farther?

MR. BYERLEY: Of course you could, your Honor.

THE COURT: What?

MR. BYERLEY: Of course you could.

MR. TRUMBAUER: I think, your Honor, if we can let the witness step down and look through the records, perhaps he can find the one—

THE COURT: I will take a five-minute recess, and I wish counsel would get this thing straightened out. I'm not going to sit there all afternoon and go through a lot useless objections trying to get to the heart of this matter.

I have worked very faithfully trying to get to the core of this case, and it's not an easy matter and it's going to be a protracted case, and I spent the morning with counsel and discussed this matter informally in chambers, hoping we could expedite it in some way.

Now, if the Government are going to insist on every roadblock they can find and every objection that they can conceive, this case is set for trial next Tuesday, and I don't know what I will do with this case next Tuesday.

[fol. 60] Let's get this matter organized, and keeping in mind what I have said. I have got other things to do as well as this case.

We will be in recess.

(A recess was taken.)

THE COURT: Proceed, gentlemen.

Q (By Mr. Friend) Do you have the records, Mr. Daughters, that we were referring to prior to the recess to help you refresh your recollection as to the three matters that were going on simultaneously and as to the sequence of events?

A I have some records here, yes, sir, that I think will cover the situation.

You keep referring to the fact that I said three things going on simultaneously. I believe I said two or three, and this would have to do with this matter.

THE COURT: Now, what, Mr. Daughters, did you mean by two or three? Two or three what?

A Two or three matters in connection with a Kordel investigation.

THE COURT: All right.

A First was a series of samples collected and turned in to our laboratory. The first that I saw of those samples was not the samples themselves, but analytical worksheets covering a chemist's report on what he found in terms of the samples; and it is my recollection he referred [fol. 61] only to the labels and referred the labels down to me.

Q (By Mr. Friend) When was this, Mr. Daughters?

A This was in April 1960.

Q And what were the products that were the subject of this sample collection?

A Korleen Tablets, Frutex, and Organic Vitamin C Wafers.

Q Now, that's one matter that was going on at that time. What was the other one or two matters going on at the same time?

A In connection with this investigation, it is my recollection that Mr. Kordel was in town delivering a series of lectures, and inspectors were attending these lectures. I did not attend any myself.

Q When was this going on?

A In April 1960.

Q And did this investigation have anything to do with the Korleen Tablets and the Frutex Tablets?

A Yes, sir.

Q And was there a third investigation going on at the time?

A I can't recall any, no, sir. There were two things going on.

Q Would you check the records and see?

A I have done that.

Q You have done that?

A Yes, sir.

Q And the records do not reveal the existence of a third investigation; is that correct?

[fol. 62] A Not as regards Kordel, that's correct.

Q Well, how about as regards Detroit Vital Foods?

A Well, this was all one.

Q I see. Now, did you make the decision to initiate these investigations yourself, or did the decision originate from Washington?

A I can't answer that.

Q You say you can't answer that. You mean you don't know or you—

A I don't know.

Q Well, would you look at your files and see whether the decision to commence these investigations was made in your office or elsewhere.

A I don't know that there was any decision made. As far as I can remember, we received instructions to make an establishment inspection of Detroit Vital Foods in connection with this series of lectures.

MR. TRUMBAUER: Excuse me, your Honor. Here are some additional records that Mr. Fowler had that may be of help to the witness (handing documents to the witness).

THE COURT: All right.

Q (By Mr. Friend) Well, from whom did you receive those instructions?

MR. TRUMBAUER: May the witness look at these?

MR. FRIEND: Yes.

[fol. 63] A We received the instructions from Washington, according to this document, which I did not have.

Q (By Mr. Friend) Well, who in Washington?

A Dr. K. L. Milstead.

THE COURT: Who?

A Dr. K. L. Milstead.

Q (By Mr. Friend) You are looking at a document that Government counsel handed to you, Mr. Daughters. May I examine that document?

MR. BYERLEY: Your Honor, I object to counsel examining that document.

THE COURT: What's that? Speak up so I can hear you, will you?

MR. BYERLEY: I object to counsel examining that document.

THE COURT: What is your objection, for what reason?

MR. BYERLEY: That document is not covered by the Court's ruling this morning that the Government should produce matters involved in the decision to institute a civil or a criminal case.

THE COURT: I thought that the witness has already testified that from these documents before him, he has been able to refresh his memory as to this matter, as to the investigation he was making.

MR. BYERLEY: Yes, your Honor. This is a docu-
[fol. 64] ment which goes to his decision to institute an investigation, but not of the decision to institute a seizure. I draw a very great distinction.

MR. FRIEND: Your Honor, I don't understand the distinction.

THE COURT: If that's the objection, I will overrule it. Investigation of the subject matter of this suit I think is also covered. Let's get on with the matter.

Q (By Mr. Friend) Who is Mr. K. L. Milstead?

A At the time of that letter, he was Director of the Division of Regulatory Management, Food and Drug Administration, in Washington, D.C.

Q What is his position today?

A I wouldn't be sure of what his title is. He is tied in to some committee work. I don't know, sir.

Q Now, am I correct, Mr. Daughters, in that you received this communication from Mr. Milstead on or about March 25, 1960?

A It will be stamped on the back of it as to when it was—on the back of the letter.

Q I don't see a stamp. Would you look at the letter?

A I don't see a stamp, either.

Q It is dated on that day, in any event?

A March 25th. We probably got it a couple days later, yes, sir.

THE COURT: What's the date, please?

A March 25th.

[fol. 65] MR. FRIEND: March 25, 1960, your Honor. Your Honor, may I offer this letter in evidence as Defendants' Exhibit 2.

THE WITNESS: Attached to that are some documents, some literature, that I believe was sent along with the letter.

MR. FRIEND: We can offer the entire three sheets.

(An office memorandum dated March 25, 1960, with attachments, was marked Defendants' Exhibit 2 by the reporter.)

Q (By Mr. Friend) Who is Mr. Warden, W-a-r-d-e-n?

A Mr. Warden is Mr. L. L. Warden, presently in the Bureau of Regulatory Compliance, Division of Field Operations. I think he was still in that position then.

Q Isn't it a fact that Mr. Milstead informed you that he would like to make a seizure of Nutri-Time, misbranded by oral claims during lectures, and to try to tie up with the stuff in the warehouse?

A May I see that and see if he said that? (Defendants' Exhibit 2 was handed to the witness.) These are longhand notes of one Theodore C. Maraviglia, presently of Cincinnati district.

Q Well, how did he get into this?

A He was chief inspector here.

Q I see. In any event, you received that written communication from the chief inspector?

A No. I received this blue letter from Dr. Milstead.

Q How did you come to have the handwritten sheet in [fol. 66] your possession?

A I passed this on to Mr. Maraviglia—it shows here TCM, with my initials on it—and he made some notes. I can't explain his notes. They may be self-explanatory. I haven't even seen them before that I am aware of.

Q Were those notes referred to Mr. Milstead, do you know?

THE COURT: Referred to what?

MR. FRIEND: To Mr. Milstead.

Q (By Mr. Friend) Was this handwritten sheet referred to Mr. Milstead?

A I would conclude it has to do with some Kordel lectures that we were instructed to look into. That's why it is attached to the file.

Q You were informed by Mr. Milstead at the time, Mr. Daughters, were you not, that it was entirely possible that Nutri-Time and other products in the warehouse will

be subject to seizure based upon claims which Kordel would make in his lectures and the literature?

A Well, I can go back further than this to answer your question, and I must.

Q My question is a simple one, sir. Were you so informed by Mr. Milstead on or about March 25, 1960?

MR. TRUMBAUER: Your Honor, I submit that if the witness says that he has to go back a little further to explain it—

[fol. 67] THE COURT: Well, he may answer. What was your explanation you wanted to add to that here? What did you want to say?

A Well, Mr. Kordel has come to Detroit over the years and delivered lectures.

Now, I don't recall the first time that Detroit District had inspectors sitting in on his lectures. I am sure it was previous to 1960.

Now, I don't have the file that goes back that far, sir.

THE COURT: Well, but now the specific question is—

A Now, the specific question is whether or not he thought there may be some misbranding by lectures.

Our experience in former auditing of talks by Mr. Kordel indicated that there might be that. That's the only reason I can conclude that Milstead said that.

THE COURT: What was the precise question here? Does that cover your question or not?

MR. FRIEND: I believe the witness has answered "Yes" to the question, with an explanation, and that would be an answer to my question.

THE COURT: All right.

Q (By Mr. Friend) Now, did you at any time receive a communication or instructions from Washington to make an investigation for the purpose of bringing a criminal action against these defendants?

[fol. 68] A Not that I am aware of, no, sir.

Q In fact, the only communication that you received was with respect to the possibility of bringing a seizure action?

A On Nutri-Time.

THE COURT: On what?

A On Nutri-Time.

Q (By Mr. Friend) Oh, on Nutri-Time?
A Doesn't it say that?
Q Yes. It says "Nutri-Time and other products."
A O.K.
Q Well, did you receive instructions from Washington to commence an investigation for the purpose of bringing a criminal case against the defendants with respect to other products?
A No, sir.
Q Did you at any time make an investigation concerning criminal violation of the Act?
A Yes.
Q When did you do that?
A This again requires some explanation.
Q Well, the question is when did you do it?
A Simultaneously.
MR. TRUMBAUER: Your Honor, again I submit that the witness has a right to give an explanation for his answers.
MR. FRIEND: Well, I'm not precluding him, your Honor. He can make whatever explanation he wishes, but [fol. 69] I asked the question as to when he made this investigation. He can answer the question, and then if he wants to give an explanation, he may. I have no objection to it. He ought to answer the question.
A Both investigations were the same investigation.
Q (By Mr. Friend) What do you mean by that, both investigations were the same investigation?
A The Food, Drug & Cosmetic Act sets up three sanctions.
THE COURT: What was that?
A The Food, Drug & Cosmetic Act sets up three sanctions—seizure to remove merchandise from channels of commerce, injunction to prohibit further interstate movement in interstate commerce, and criminal prosecution against those responsible for such shipments or misbranding in interstate commerce.
THE COURT: Yes?
A One series of incidents, as in the case of these lectures, resulted in Detroit District recommending seizure of these three items I mentioned.

THE COURT: Now, what are the three items again?

A Korleen, Furtex, and Organic Vitamin C.

THE COURT: Now, is that the type of drug that is involved in this prosecution?

MR. FRIEND: No, sir. Only two of them are. Organic Vitamin C, I believe, was dismissed as one of the counts, if it was ever in the indictment at all. I don't [fol. 70] recall that it was.

MR. BYERLEY: The only product remaining in the prosecution now is Korleen—that is, that is concerned with this—

THE COURT: Is that all that is remaining in this case, Korleen?

MR. FRIEND: No, no.

MR. BYERLEY: No. But there are other counts that refer to later things that happened in Detroit with which we are not concerned today.

THE COURT: My question is, what type of drugs are involved in the remaining counts in this prosecution?

MR. BYERLEY: Korleen, Nutri-Time.

THE COURT: Korleen, and what is the second one?

MR. BYERLEY: Nutri-Time.

MR. FRIEND: The very vitamin, your Honor, that is referred to in Defendants' Exhibit 2, in this letter from Mr. Milstead, Nutri-Time, which is a vitamin supplement.

Frutex is the third product, and another one is called Aminex, which is a vitamin product.

There are four products involved in the six counts.

THE COURT: Go ahead.

THE WITNESS: On the basis of misbranding, which we considered at Detroit to be a misbranding, we recom- [fol. 71] mended seizure of these three products on April 28, 1960.

At a later date—and I don't recall when it was—we again audited some lectures, and I'm not positive as to continuity here—I think counsel has the papers—sometime later, after these reports were in, we received instructions from Washington relative to holding a hearing under Section 335 of the FD&C Act, to hold a hearing to see whether or not prosecution was indicated.

Q (By Mr. Friend) Was that prosecution for the very same products with respect to which you had recommended the institution of a seizure action?

A Yes, sir, among others.

THE COURT: Now, what was it? I didn't quite understand your answer with respect to this 335 proceeding. What did you say about that?

A This was an informal hearing for Mr. Kordel and the other defendants—

THE COURT: You mean it was a hearing that was held? Who suggested that?

A Our Washington offices suggested it to us.

THE COURT: I see. All right.

A And that I believe, too, is signed by Dr. Milstead.

THE COURT: All right.

Q (By Mr. Friend) Well, before we get to that, Mr. Daughters, you said that you made a recommendation to [fol. 72] Washington to make a seizure of these products based upon your investigation which was taking place in about April.

A That's correct.

Q Was that recommendation in written form?

A The recommendation for seizure?

Q Yes.

A Yes, sir.

Q Do you have the written document?

A Yes.

Q May I have it, please?

A (Handing documents to Mr. Friend.) My recommendation is down in the right-hand corner, right under your thumb.

MR. FRIEND: Would you mark these, please, as Defendants' Exhibits 3 and 4.

(A carbon copy of a recommendation for seizure (Korleen Tablets) was marked Defendants' Exhibit 3 by the reporter; and a carbon copy of a recommendation for seizure (Frutex) was marked Defendants' Exhibit 4 by the reporter.)

Q (By Mr. Friend) Referring to Defendants' Exhibit 3 and 4, Mr. Daughters, which have been marked

for identification at this point, do I understand that on April 28th or thereabouts, 1960, you recommended to Washington that a seizure be made of the Korleen Tablets and the Frutex Tablets?

A Yes, sir. It says on the basis of misbranding, 403(a) and 502(f) of the Food, Drug & Cosmetic Act.

[fol. 73] Q And is this the actual communication and recommendation that you sent on to Washington?

A That is a carbon of it, yes, sir.

MR. FRIEND: I offer them in evidence.

THE COURT: Are they marked?

MR. FRIEND: I have alrady had them marked.

THE COURT: What are they, what exhibit?

MR. FRIEND: Exhibit 3 is the recommendation for Korleen; Exhibit 4 is the recommendation for the Frutex.

Q (By Mr. Friend) To whom did you, Mr. Daughters, address these recommendations, or to whom were they sent at the Food and Drug Administration?

A They would simply go to the Food and Drug Administration, Washington, D.C., attention—at that time it would be Division of Regulatory Management.

Q Who was in charge of that?

A Dr. Milstead.

Q Is that the agency or the division of the agency that now is handled by Mr. Yakowitz under a different name, namely, the Division of Case Supervision, or some such—

A I believe that is essentially it, yes, sir.

Q Now, did you ever receive a response from Washington concerning the filing of the civil action, the seizure action?

A We would have heard of that from the United States Attorney here.

[fol. 74] Q When did you hear from the United States Attorney that a seizure action was contemplated being filed or had been filed?

A I don't know if Mr. Fowler has those papers or not. I do not have.

Q Well, Mr. Daughters, I show you the monition or copy of the monition issued in Civil No. 20215, and ask you to look at it and see if it refreshes your recollection

as to when you heard from the United States Attorney that a seizure action was being filed.

MR. TRUMBAUER: Well, your Honor, there is no mystery about when the seizure action was filed. That is a matter of the Court's record.

THE COURT: That's a matter of record. It was filed June 9, 1960. I can testify to that.

A That's what this says.

Q (By Mr. Friend) Now, did you hear of it on June 9th, or did you hear of it before June 9, 1960?

A Well, I couldn't answer. I would imagine we had heard of it before then. This was the Marshal's paper essentially, the seizure paper. The U. S. Attorney would have filed the libel before then, and he probably would have discussed it with us before filing it.

Q Well, did you hear of it through a written communication from the U. S. Attorney, and would you check your records to see if you have such a written communication?

[fol. 75] A I don't here.

(A document was handed to the witness by Mr. Trumbauer.)

A The libel was filed on June 9th. We have a written communication from Mr. Kaess, the U. S. Attorney at that time, telling us he had filed the libel on that date.

We also have a copy of a document from General Counsel to Mr. Kaess, dated June 6th, asking him to file a proposed libel.

Q Well, do you know, Mr. Daughters, who actually prepared the libel? When I say who, I mean which agency, is really what I mean.

A I would assume it was prepared by the General Counsel's office, Food and Drug Administration in Washington.

Q Well, isn't it a fact, sir, that the Food and Drug Administration prepared the libel and forwarded it to the U. S. Attorney, Mr. Kaess, for filing?

A That's what the letter from Goodrich says, yes, sir.

Q Who is Goodrich?

A He's General Counsel of the Food and Drug Administration.

Q May I look at the letter which you are referring to?

THE COURT: Is that important in this sequence of events?

MR. FRIEND: I just wanted to look at it, your Honor.

[fol. 76] THE COURT: I wish we could proceed on this matter so we can get to the point in issue here.

MR. FRIEND: Yes, sir.

Q (By Mr. Friend) Now, when, Mr. Daughters, for the first time did your office learn that the Government was contemplating filing a criminal notice of hearing against these defendants with respect to the same products, namely, Korleen and Frutex, that were the subject of this libel filed on June 9, 1960?

A We wouldn't have received that kind of information next at all. We would have received instructions from the Administration to issue a citation under Section 335 of the law so that the three proposed defendants could appear and give their views of this alleged misbranding.

Q Well, my question to you is, when for the first time —it's the very question that I am asking you—did you learn that the Food and Drug Administration was contemplating initiating Section 335 criminal notices of hearing against these defendants?

A I don't believe that under Section 335 there ever has been any criminal notice against any defendant. Prosecutions of defendants are under 331.

Q Well, I think you misunderstand the point. Under Section 335, Mr. Daughters, there is a document known as a notice of hearing which is sent out.

A Yes.

Q Now, my question is, when for the first time did you [fol. 77] learn that the Food and Drug Administration in Washington was contemplating initiating Section 335 proceedings?

A That was on December 29, 1960.

THE COURT: Let's see. December 29, 1960?

A Yes, sir.

THE COURT: Washington advised you?

A Yes, sir; to cite these three defendants in connection with—

THE COURT: For a 335 hearing?

A Under Section 335, yes, sir.

Q (By Mr. Friend) Are you looking at a written notification to that effect?

A Yes, sir; from Dr. Milstead.

Q May I see it?

A (Document handed to Mr. Friend.)

THE COURT: When were they actually cited for that hearing?

A About two weeks later.

Q (By Mr. Friend) In that connection, relative to his Honor's question, I show you what has been marked as Defendants' Exhibit 1 for identification and ask you if that is a copy of the actual citation?

A Yes, sir.

MR. FRIEND: I offer that in evidence, your Honor.

THE COURT: What is the date of that?

MR. FRIEND: January 19, 1961.

[fol. 78] Would you mark this letter as Defendants' Exhibit 5.

(A letter dated December 29, 1960, signed by K. L. Milstead, was marked Defendants' Exhibit 5 by the reporter.)

Q (By Mr. Friend) I show you Defendants' Exhibit 5 and ask you if this is the communication from Mr. Milstead that you received instructing you to file a criminal notice of hearing under Section 335?

A Yes, sir; and we received it on January 9, 1961.

THE COURT: Is this the information that you have previously referred to?

A Yes, sir.

THE COURT: Dated December 29, 1960 and received by your office on January 9, 1961?

A Yes, sir.

THE COURT: Do you offer this in evidence?

MR. FRIEND: Yes.

THE COURT: Any objection?

MR. TRUMBAUER: No, your Honor.

THE COURT: Received.

Q (By Mr. Friend) Now, Mr. Daughters, Defendants' Exhibit 5 and Defendants' Exhibit 1, the notice of hearing, refer to products other than the Korleen and the Frutex, and these exhibits refer to samples other than the Korleen and the Frutex?

A Yes, sir.

[fol. 79] Q Well, did your office collect samples of other products between the time that they were working on the Korleen and Frutex in April of 1960 and the time that Mr. Milstead wrote you that letter which has been received as Defendants' Exhibit 5?

THE COURT: Wait a minute. What was that question, please?

(The last question was read by the reporter.)

A Yes, we did.

Q (By Mr. Friend) What other products did you investigate and collect samples of?

A They would be the other items mentioned in Dr. Milstead's letter of the 29th of December.

Q Which you have before you?

A No, sir.

THE COURT: I have it (handing exhibit to the witness).

A Thank you.

Q (By Mr. Friend) Did you make any recommendation, Mr. Daughters, as to the type of action you thought ought to be brought for these other samples that you collected?

A Previous to the time of receipt of this letter?

Q Yes, sir.

A No, sir.

Q Well, when did you collect the samples for Nutri-Time and Aminex which are involved in this indictment?

[fol. 80] THE COURT: Nutri-Time and what else?

MR. FRIEND: Aminex, A-m-i-n-e-x, your Honor.

MR. BYERLEY: Your Honor, may I be heard on this a moment? This is not an objection, but I don't think that the records before the witness will reveal that, because the products Nutri-Time and Aminex are not now

involved in this prosecution. He has the file which is involved in the prosecution, and he does not—

THE COURT: He what?

MR. BYERLEY: He has the file which is involved in the criminal case. Since these products are not involved in the criminal case, he does not have those records before him.

MR. FRIEND: Your Honor, Nutri-Time is Count No. 8, I believe, and Aminex is Count No. 9.

MR. BYERLEY: Yes, your Honor; but those were shipments to New York, not shipments to—

THE COURT: They are what?

MR. BYERLEY: The Nutri-Time involved in Count 8 was shipped to New York City, not involved here and was not part of his investigation. So he does not have the records pertaining to Nutri-Time and Aminex before him, since this investigation was conducted by someone else.

THE WITNESS: New York district conducted an investigation somewhat later than we did, as I recall it, [fol. 81] and these two counts involve samples obtained by New York district, not by Detroit.

THE COURT: All right.

Q (By Mr. Friend) In other words, you didn't make the investigation for Nutri-Time and Aminex?

A I believe that's correct. We did make other investigations and did collect other samples.

Q Now, after the libel of information was filed in the civil case, did your office have anything to do with the handling of that case in any manner whatsoever?

A Yes, I'm sure Mr. Fowler worked with Mr. Trumbauer or whoever else was the Assistant U. S. Attorney handling the case, yes. I did not personally; the office did, Mr. Fowler did.

THE COURT: Mr. who?

A Fowler, my deputy, sitting right back there, sir.

Q (By Mr. Friend) When you say he worked with Mr. Trumbauer or the other Assistant U. S. Attorney that was on the case originally, just what did he do in assisting the U. S. Attorney?

MR. TRUMBAUER: Your Honor, I object to that

question. I think that is properly a question to be asked of Mr. Fowler.

THE COURT: Well, if he knows, of course, he could testify to the extent that he has personal knowledge of it.

A I have no personal knowledge of it. I know what is routine.

THE COURT: Why would that be relevant to the [fol. 82] precise subject matter under inquiry here, anyway?

MR. FRIEND: Your Honor, this pertains to the preparation of interrogatories—

THE COURT: But the criminal prosecution was—well, of course, I don't know when the investigation was commenced, but the indictment was filed June 17, 1963.

MR. FRIEND: That's right, your Honor.

THE COURT: July 17, 1963.

MR. FRIEND: That's right.

Q (By Mr. Friend) What would be the usual assistance rendered by your deputy in the handling of a case?

MR. TRUMBAUER: Your Honor, again I object merely to save the Court's time.

THE COURT: Well, I think I will sustain the objection. The witness can testify. I don't think that what the normal procedure was would be binding here.

Q (By Mr. Friend) Now, do you know who made the decision to issue a criminal notice of hearing?

THE COURT: What are you speaking of now, this 335 notice?

MR. FRIEND: Yes, sir.

A That isn't a criminal notice of hearing that I am aware of.

THE COURT: Well, maybe it isn't labeled that, but you know what we mean, do you, by that—a Section 335 notice?

[fol. 83] A We received instructions from Dr. Milstead to issue such a notice.

THE COURT: Well, Section 335 is titled "Hearing Before Report of Criminal Violation," and it goes on to state:

> "Before any violation of this chapter is reported by the Secretary to any United States Attorney for

institution of a criminal proceeding, the person against whom such proceeding is contemplated shall be given appropriate notice and an opportunity to present his views. . ." and so forth.

It is a notice of hearing, isn't it?

A That's right.

THE COURT: Of a possible criminal prosecution.

A Yes, sir.

Q (By Mr. Friend) That's why I refer to it as a criminal notice of hearing. As far as you know, then, it was Dr. Milstead, the same Dr. Milstead to whom you had recommended a seizure action?

A That's right.

MR. TRUMBAUER: That's already in evidence. That's Exhibit 5. I object to the redundancy of these questions, your Honor. It is just wasting the Court's time and everybody else's time.

MR. FRIEND: Well, I don't intend to waste the Court's time. I will move along as best I can.

[fol. 84] Q (By Mr. Friend) Mr. Daughters, did your office have anything to do with the preparation of interrogatories in the civil case?

A No, sir.

Q Do you know who prepared those interrogatories?

A No, sir.

Q Did there come a time, Mr. Daughters, when the libel of information was amended with respect to the product Frutex so as to expand the charges that had been originally made?

A The U. S. Attorney would know that. I don't know.

Q Did you make any additional investigations concerning Frutex and Korleen after the seizure action had been started?

A I am aware of none.

Q Now, did you receive a response to the notice of hearing?

A Yes, sir.

Q Do you have that?

A I don't have it here. Do you have it, Mr. Fowler?

The response to the notice of hearing—I reviewed that

recently—indicated that they didn't want to hold a hearing in Detroit; they wanted to hold it in New York; and it is signed by Mr. Friend, I believe, in behalf of Bass and Friend.

Q And did you, Mr. Daughters, in fact transfer the hearing to New York for the convenience of counsel in New York?

A We transferred all the records there and I understand yes, that's correct.

[fol. 85] Q And isn't it true that you transferred the hearing to the New York district, either Mr. Killingsworth or Mr. Loftus in New York?

A I wouldn't know that.

Q But it was the District Director?

A Yes, sir, that's correct.

Q Now, you say you transferred the records there. Was there any information or any records in the criminal case that you transferred to New York that were part of the investigation that you had made for the civil case?

A Indeed.

Q Well, what records? Can you describe for his Honor what records you included in the criminal file that you forwarded to New York that were part of the civil case?

A All of the sample collection reports, the examination results, the information relative to the lectures—everything that had to do with our seizure recommendation on the three items we recommended for seizure, along with these other samples which were collected subsequently.

Q Did you send a copy of the libel of information to New York?

A I would say we sent our entire file.

Q Well, did you include the libel of information?

A I would think so. I could not be sure.

Q Can you check your files and see?

A I don't think our files would show. I think our files [fol. 86] will show that we are transmitting our files.

Q When you say your records would show a transmission of the files—this is important, Mr. Daughters, so forgive me if I am repeating it—you mean the files that were part of the civil case as well as the files that were part of the possible criminal case?

A That's correct.

Q Do you have a covering letter showing the transmission of those files?

A We should have.

Q Would you produce it, please?

(A document was handed to the witness by Mr. Byerley.)

A Here is our file copy of it, yes, sir.

Q Can I see it?

A It states that we transferred it to New York at your request.

Q Would you remove this letter from the file, Mr. Daughters—I don't want to damage it—so that I may offer it in evidence.

A (The witness removed the letter from the file.)

MR. FRIEND: Do you want to mark it Defendants' Exhibit 6, please.

(A carbon copy of a letter dated February 1, 1961, was marked Defendants' Exhibit 6 by the reporter.)

MR. TRUMBAUER: Are you offering it?

MR. FRIEND: Not yet.

[fol. 87] Q (By Mr. Friend) Isn't it a fact, Mr. Daughters, that on February 1st you transmitted what you refer to as the sample jackets on the Korleen and the Frutex case to New York?

A Along with all the others, yes, sir.

Q And isn't it also a fact, Mr. Daughters, that you informed the New York office that the seizure cases had not yet been adjudicated, and that you would therefore appreciate it if they returned the jackets to your office promptly?

A That's correct.

Q Do you know whether—

A Dated February 1, 1961, yes, sir.

Q Yes. I take it from this letter that included in the criminal matters that you referred to New York, you also sent to New York all of the evidence and all of the material that you had on the civil case. Is that a fair assumption for me to make?

A Yes, I would assume the same thing.

Q Is there any particular reason that you found it necessary to refer to the fact that the civil case had not yet been adjudicated, when in fact you were referring a criminal matter to the New York office?

A I wouldn't say there was any significance to that at all. I would say that this is routine.

Q What is routine?

A Very often we will have under consideration a seizure and simultaneously, say, an injunction or simulta- [fol. 88] neously a prosecution, or perhaps all three.

Q Well, it is true therefore, is it not, that at the very time that the civil action was pending, the Food and Drug Administration had under consideration, as you put it, the bringing of a criminal case?

A Very definitely. I think the civil action is still pending, is it not?

MR. FRIEND: The civil action, just for the record, your Honor, is not pending any longer.

Q (By Mr. Friend) Now, do you have any information as to what happened in New York after the matter was referred and your files were referred to New York?

A Yes. The files were returned to us by a memorandum from Mr. Killingsworth that you referred to a minute ago.

Q Yes?

A In which he reports a record of hearing.

Q Now, when he sent back the files to you, did you check to make sure he sent everything back?

A Yes, sir.

Q Now, did those files include copies of the papers that had already been filed at that point in the civil seizure case?

A Unless some came in in the intervening period while our other files were in New York.

Q You mean, Mr. Daughters, that when there is a civil seizure case pending which is being handled by the [fol. 89] Department of Justice under the Food & Drug law, your files on that matter would include all of the papers in the civil case?

A They would for purposes of the hearing.

Q That's the point. They would for purposes of the hearing?

A Yes, sir.

Q Of the criminal hearing?

A Yes, sir.

Q Now, would those papers include, for example, interrogatories?

A If there were any on file, I don't know why they would, because that would have to do with the civil matter.

Q Well, you just got through telling us that anything that had to do with the civil matter, if it also related to the criminal matter, you would have file copies of those papers.

A That was pertinent. I should have put in "that was pertinent to this hearing." I couldn't answer specifically on whether or not interrogatories in connection with the civil suit were ever seen in New York. I don't know.

Q Well, did your office see it before you sent the file on to New York?

A Mr. Fowler sent it down.

Q When I say you, I mean your office.

A Yes.

Q Now, is it the practice for your office to receive and to include within your office file copies of such documents as interrogatories or answers to interrogatories [fol. 90] which are filed in the District Court?

A I wouldn't know the answer to that. Mr. Fowler might.

Q Mr. Fowler might know what documents were in fact part of his file which were submitted to New York on February 1st?

A That's correct.

Q All right. We may have to question Mr. Fowler about that.

Now, you refer to a response that was made in New York to the notice of hearing. May I have the letters or letter that you received from New York?

A (Documents handed to Mr. Friend.)

MR. FRIEND: Would you mark this as Defendants' Exhibit 7, please.

(A letter dated March 10, 1961, from F. K. Killingsworth, with attachment, was marked Defendants' Exhibit 7 by the reporter.)

MR. FRIEND: I offer these in evidence, Mr. Trumbauer.

MR. TRUMBAUER: No objection.

THE COURT: Received.

MR. FRIEND: Your Honor, to save time and to give some continuity, I would like to direct your attention, sir, to the fact that on March 10, 1961, the jackets were returned to New York together with a transcript of a hearing which was held in New York, and since it is short, your Honor, may I take this time to read it to you, [fol. 91] sir, so that you can follow the sequence of events.

MR. TRUMBAUER: Why don't you just give it to the Court?

THE COURT: What's that?

MR. TRUMBAUER: I was going to just suggest that he just hand it to the Court. It is in evidence. The Court can read it.

THE COURT: What part of this is pertinent to the issue here?

MR. FRIEND: What is pertinent to the issue, your Honor, is that on the response my partner, Mr. Bass, questioned the procedure employed by the Food and Drug Administration in issuing the notice of hearing relating to a criminal proceeding, and affording us ostensibly an opportunity to explain why they shouldn't bring a criminal case, at the very same time that a civil action was pending bearing upon the same issues and subject matter and—

THE COURT: Well, that's all in the record now, isn't it?

MR. TRUMBAUER: That's all in the record.

THE COURT: Why do you need anything more on that? You have got the case was filed on June 9, 1960, the libel action. You have got in the record here when this 335 hearing was initiated, when it was suggested, when the hearing was held. Why do you have to get all

that in? Don't get this so complicated that I will lose track of this point in issue.

I don't see any point to encumbering the record with [fol. 92] something more if that's all you want to show. That's all before me now.

MR. FRIEND: Only to show, your Honor, continuing objection from the time we filed the motion with Judge Levin in this court even at the time the notice of hearing was responded to. That's the only point. This wasn't an afterthought on our part. We objected vigorously.

THE COURT: That's in the record, isn't it?

MR. TRUMBAUER: That's in the record in Civil Case 21205.

THE COURT: Yes. That was before me on the motion.

MR. FRIEND: Yes.

Q (By Mr. Friend) Now, defendants' Exhibit 1, which is the notice of hearing, says that if the respondents do not respond to the notice of hearing, the decision on whether to refer the matter to the Department of Justice for prosecution will be based on the evidence at hand. Have I correctly—

A That's correct. It is stated in there in typed form —printed form.

Q Were you referring in that letter to the evidence that your office had collected when it made its sample collections and its investigation of Mr. Kordel's lectures?

A The whole picture of all the evidence we had, yes, sir.

Q And the evidence that you had, I take it, included the same evidence that was in the basis of you recommen- [fol. 93] dation to file a civil case?

A Yes. Among other things, that's right.

Q So that at that time, on January 19, 1961, or even before, when you heard from Mr. Milstead, the Food and Drug Administration, according to your letter, had had all of the evidence which it might need to determine whether to refer the matter to the Department of Justice for prosecution; am I correct?

A I don't think so. I don't think it says that. You are concluding for me now.

Q That's what I asked you.

A I would consider that a hearing under 335 is just what it expresses.

THE COURT: Is what?

A Just what it expresses—an opportunity for you to present your views. Certainly, as far as I am concerned —and this is true for Mr. Fowler—neither one of us had made up our minds in advance of the hearing that somebody will be prosecuted.

Q (By Mr. Friend) Doesn't your letter to these defendants in effect advise them that your investigation shows their responsibility for criminal violations of the Act, and that if no response is made to the notice of hearing, the decision to refer the matter to the Department of Justice will be made on the basis of the evidence at hand?

MR. TRUMBAUER: Your Honor, I am going to have to object. The exhibit is in evidence. The Court can [fol. 94] read it. It's there; we can't change it.

MR. FRIEND: But this is preliminary to a question, your Honor.

MR. TRUMBAUER: This is badgering the witness.

MR. FRIEND: I'm not badgering the witness.

A Yes, sir, it says that.

Q (By Mr. Friend) Now, do you know when the matter was referred to the Department of Justice for criminal prosecution?

A I don't have the paper here, sir, but I'm sure Mr. Fowler does, or maybe counsel does. It is called "Summary and Recommendation."

MR. TRUMBAUER: We will stipulate for the record, your Honor, that the date of June 13, 1962 was the date of a letter from the Food and Drug Administration to the Department of Justice, requesting the institution of criminal proceedings.

THE COURT: What date?

MR. TRUMBAUER: June 13, 1962.

MR. FRIEND: Your Honor, the witness referred to a report entitled "Summary and Recommendation," and I think that that is one of the crucial documents; and rather than have the stipulation solely as to the date that

the referral was made to Justice for criminal prosecution, I think that I would ask your Honor to require them to produce for my inspection and further questioning of this witness the actual recommendation and summary, to see whether there is anything in there that relates to the civil case.

[fol. 95] MR. TRUMBAUER: Are you referring to the recommendation and summary, counsel, of the local office to the Food and Drug Administration in Washington?

MR. FRIEND: No. That wasn't what I—

THE COURT: What do you want?

MR. FRIEND: I want to know, your Honor—

THE COURT: What records do you want?

MR. FRIEND: I want to have the records, the written report of the recommendation made by the Food and Drug Administration to the Department of Justice to bring a criminal case.

THE COURT: That's the one Mr. Trumbauer is just referring to.

THE WITNESS: That's right.

MR. BYERLEY: We will make it available.

THE WITNESS: We don't have that.

MR. TRUMBAUER: But this witness has no knowledge of that letter, and that's why it will be difficult, except that we will offer it and stipulate to it.

MR. BYERLEY: Your Honor, if I may, this is one which goes from our General Counsel's office to the Department of Justice. I can put it into evidence and testify to it myself. Mr. Fowler or Mr. Daughters cannot.

MR. FRIEND: Well, your Honor, I asked Mr. Daughters, and I object to these gentlemen testifying in a [fol. 96] matter like this, particularly when he is counsel at this point.

THE COURT: What do you want, now? What are you asking?

MR. FRIEND: I asked Mr. Daughters a question.

THE COURT: What is it?

MR. FRIEND: As to when the Food and Drug Administration made its recommendation to the Justice Department to bring a criminal case. He referred to a

summary. I am now calling for the production of that summary and recommendation.

A If the Court please, I misunderstood his question.

THE COURT: I see.

A Detroit District did recommend to Dr. Milstead a prosecution. He is not asking for that. That was the document I was referring to.

THE COURT: I see.

Q (By Mr. Friend) I see. In view of Mr. Byerley's statement that we are really referring to two different documents, I would like to see the document and report that your office made to Dr. Milstead.

THE COURT: All right. Do you have that?

MR. TRUMBAUER: Yes, we have that.

THE COURT: All right.

[fol. 97] MR. TRUMBAUER: Your Honor, I have here the summary that I believe Mr. Daughters is referring to, the one from the Detroit District to the Administration.

However, it is a document, your Honor, which includes within it many aspects of the Government's whole criminal case and as to witnesses who are going to testify and —well, it gives the whole case.

Now, we feel that such a document as that should be inspected by the Court in camera to find out whether—

THE COURT: Well, is it necessary that I inspect it or that the whole document come in? You are interested in the date, aren't you?

MR. FRIEND: I am interested, your Honor, first in the date, and secondly in any part of it or portion that refers to the civil case.

MR. BYERLEY: Your Honor, in that case we can give him the date. There is one paragraph which refers to the civil case. We can make that available.

THE COURT: If you will speak up. I can't hear you.

MR. BYERLEY: In that case, we will make available the date and the one paragraph which does refer to the civil case. We will submit it to the Court to show hat onlv one paragraph refers to the civil case.

THE COURT: I don't think they have to show [fol. 98] everything that they include in this recommen-

dation for criminal prosecution—all of the evidence, and so forth. You are not asking for that?

MR. FRIEND: No, sir, and I'm not claiming I am entitled to that. I want to know what the connection—

THE COURT: Can you show enough of that to counsel right now so he can see it, so we can get on with something else here?

MR. BYERLEY: Your Honor, I respectfully submit that I will be happy to submit this to the Court if Mr. Friend wishes. Otherwise, I will inform Mr. Friend that I have here the single partial paragraph that refers to the civil case in any manner.

Will you accept my word for that?

MR. TRUMBAUER: I have the original here for the Court's inspection, in case—

MR. FRIEND: I think, your Honor, that I would accept what Mr. Byerley says, but I think your Honor, since it isn't too long a paper, should see if there are any other parts of it that do have some bearing upon the fact that there was a civil case pending at the same time that Mr. Daughters was recommending criminal prosecution.

THE COURT: Well, I will take this home with me tonight and read it, I guess.

MR. BYERLEY: If you won't take my word for it, [fol. 99] all right.

MR. FRIEND: I said I would take your word for it.

THE COURT: This memorandum bears the date July 25, 1961.

Is that the date, witness—

A Yes, sir.

THE COURT: —that your office recommended criminal prosecution?

A I believe the document underneath there would have a different date.

THE COURT: Oh.

A Up at the top to the right it should be, I believe.

THE COURT: Yes, that's right.

A This is the date we transmitted it. This is the date it was written up.

THE COURT: Well, what do you mean? That bears an earlier date, July 25, 1961.

A I can't explain that.

THE COURT: And it was written July 28th. That couldn't be, could it?

A No. I couldn't answer it, your Honor.

THE COURT: Well, say about July 25th or July 28, 1961; is that correct?

A That's correct, yes, sir.

THE COURT: When you recommended criminal [fol. 100] prosecution, when your office did?

A Yes, sir.

THE COURT: Now, what else do you want?

MR. FRIEND: We want to know, your Honor, any references that are made in that document to the pending civil case.

THE COURT: Are there any references in here to the pending civil case? You can find it probably quicker than I can (handing document to the witness).

A What page is that on, counsel?

MR. TRUMBAUER: I believe page 8 has the reference, but you should look through the rest of it.

A At the top of page 8 it refers to it.

THE COURT: What part of this do you claim?

A The top paragraph here, sir, refers to some of these numbers in question that were under seizure at the time.

THE COURT: Oh, boy. I have to take these numbers and go back and tract those, I suppose.

MR. TRUMBAUER: In addition, your Honor, on the first page of the document entitled "Summary and Recommendation," there is a listing of the samples and the dates of the seizures, so in all honesty, that would also be a reference at least to the seizures, although not specifically.

THE WITNESS: There is a reference made on the cover page, your Honor. In listing of those samples, you [fol. 101] will find Frutex and Korleen in there.

THE COURT: Yes, I see those.

A Yes, sir. That's the other reference there to these items under seizure.

THE COURT: Well, I would have to read the whole thing, if you want to put the burden on me, to see whether what is in here is relative to the civil case.

Now, I don't know what all is involved in the civil case or what all is involved in the criminal case. There is data set forth here, columns of data. They have sample number, product, date shipped, carrier, seized, and explanations made by marks, citation issued to, legal status, alleged violation, recommendation, and so on and so on and so on. I don't know whether I could tell from reading this what portions of this refer to the civil case.

Now, if it is the subject matter of the civil case, I wouldn't know. I could tell if it was referring to the civil case as such or by number or something, but for me to go through here and attempt to dig out the products upon which the civil case was based and see if that is referred to, I would need to know something about the civil case, and I don't know anything about the civil case.

MR. FRIEND: Your Honor, I can ask Mr. Daughters whether his report in reference to sample numbers does not in fact include references to the products that were [fol. 102] under seizure in the civil case and products which are the subject of the criminal action. We don't have to spend time trying to figure out which sample numbers are which. They are obviously—

THE COURT: Well, why don't you ask him that?

MR. FRIEND: All right, I will, sir.

A The answer is yes.

MR. FRIEND: That takes care of that.

Now, your Honor, may I see the portion that Mr. Byerley offered to let me look at that refers to the civil case?

THE COURT: You have no objection to that, have you?

MR. TRUMBAUER: I think we tore it off.

MR. BYERLEY: There is no objection, your Honor, but I would like to amend my offer. I have just glanced through it again and found another section.

THE COURT: You what?

MR. BYERLEY: I have just found another section, which I would like also to show Mr. Friend.

THE COURT: Well, find it all and we will take it up in the morning, then. I don't think there is any use in wasting any more time here tonight. Check it over and in the morning show the portions that are pertinent to this

point to counsel before we proceed with the hearing. We are going to start tomorrow morning at nine and we will [fol. 103] run until one at least. I hope to finish it in that time, and I wish we would get right to the heart of this matter as fast as we can.

(An adjournment was taken until 9:00 o'clock A.M. of the following day, Thursday, August 5, 1965.)

[fol. 104] Detroit, Michigan
Thursday, August 5, 1965
9:10 o'clock A.M.

(The hearing was resumed pursuant to the adjournment.)

MR. BYERLEY: Good morning, your Honor.
THE COURT: Good morning. All right, you may proceed.

GEORGE T. DAUGHTERS resumed the stand as a witness herein, and, having been previously duly sworn, testified further as follows:

DIRECT EXAMINATION (Continued)

BY MR. FRIEND:

MR. TRUMBAUER: Your Honor, we have made available to counsel—
MR. FRIEND: Well, that's what I wanted to say, Mr. Trumbauer.
They have made available to me, sir, pieces of the summary and recommendation that they say contains all of the references to the civil case. If your Honor will

recall, this was the summary and recommendation that Mr. Daughters' office made to prosecute the defendants [fol. 105] criminally, and it is in that summary and recommendation that there are some references made to the civil case.

Now, firstly, the parts that they have cut out and given me appear to be a little unintelligible, in that they are taken out of context in the middle of paragraphs; and I would therefore request that your Honor allow me to see the report, particularly the part of the report that actually makes the criminal recommendation and the paragraph that has been expunged on the second sheet, wherein all that they have done is given me just one sentence or two out of that whole paragraph.

THE COURT: May I see the original, please?

MR. TRUMBAUER: Here is the complete summary and recommendation, your Honor (handing document to the Court).

THE COURT: Now, what has been deleted here?

MR. FRIEND: Well, firstly, your Honor, they have deleted the actual recommendation that was made.

THE COURT: All right. Now, let me see here.

Where does that appear, Mr. Daughters?

A That ought to be very late in the report, sir.

THE COURT: Is this it here?

A It would be this.

THE COURT: The material appearing under the heading of "District's Conclusions"?

A Yes, sir.

THE COURT: Now, has that all been deleted?

[fol. 106] MR. FRIEND: Yes, sir. They have not given me any of that.

THE COURT: It would be all of that material under "District's Conclusions"; is that correct?

A I believe, sir, there is some of that in the—you can tell by the page number, I believe.

MR. FRIEND: Well, I can't tell from—

THE COURT: Will counsel refer me?

MR. BYERLEY: Yes, your Honor.

THE COURT: So I don't have to keep looking here.

MR. BYERLEY: "District's Conclusions" run from about one-third of the way down on page 6.

THE COURT: I can see that. I see where it is. But what have you—

MR. BYERLEY: Through page 8. We have expunged all of it except a sentence beginning at the bottom of page 7 and ending at the top of page 8.

(Short interruption.)

THE COURT: Well, the part deleted under the heading of "District's Conclusions" I have read carefully and conclude there is nothing in there that would be relevant to this hearing.

Is there anything else?

MR. FRIEND: Yes, sir. On page 5, they have given me only six lines from the bottom, is the part that they [fol. 107] have given me, page 5. The sentence starting with "Korleen Tablets" six lines from the bottom.

THE COURT: Yes?

MR. FRIEND: And my question to you, sir, was whether there is anything immediately preceding that statement.

THE COURT: Well, immediately preceding how far back?

MR. FRIEND: I can't tell whether it is part of a paragraph which is short or long, or just what part of it, but certainly it wouldn't be more than probably half of page 5.

THE COURT: Well, I might as well read the whole thing, I guess. I don't know how far back.

MR. FRIEND: I can't tell, sir, by what they have given me whether it starts a paragraph or just what it is.

Your Honor will recall that yesterday they said there was only one reference; and now they have given me sheets that appear to have three references on it.

Now, I'm not questioning as such their—

THE COURT: Can you help me on this?

MR. BYERLEY: Yes, your Honor. The paragraph to which he refers begins—

THE COURT: The paragraph what?

MR. BYERLEY: Of page 5, the last full paragraph beginning with "The Detroit News" is the—

THE COURT: Well, I can see where you have [fol. 108] started that, but why have you—

MR. BYERLEY: Preceding that, there is nothing.

THE COURT: What?

MR. BYERLEY: Preceding that there is nothing which in any way is connected with the seizure action or, for that matter, with the criminal action. I think your Honor could start with the paragraph beginning "The Detroit News" and make his decision as to the context of this sentence.

THE COURT: Well, there are several pages preceding that. How do I know where to start?

MR. FRIEND: Your Honor, I don't see why I shouldn't have the right, sir, to look at this. I'm not going to reveal it to my clients. This is an important document and it comes squarely within the scope of your Honor's order to these people.

THE COURT: Oh, well, I couldn't do that.

MR. FRIEND: Your Honor, I have a difficult problem trying to establish something from an adversary that has been less than cooperative.

THE COURT: The Government has a responsibility, and so do I, to see that none of their books and records that are not relevant to this precise issue are used in this proceeding.

MR. FRIEND: I appreciate that, sir.

THE COURT: And as long as the Government take [fol. 109] this position, I have to discharge my obligation, I suppose. I will read it.

(Short interruption.)

THE COURT: The recommendation for prosecution deals with only the product designated under sample numbers 21-133R, 134R, 136R; is that correct?

A When we recommended prosecution—

THE COURT: No. I mean 21-132R, 133R, and 134; is that correct? Is that all I am dealing with? Is that all you are dealing with here?

A 132, 133, 134, and 21-145 and 6, 21-144, 21-141, and in abeyance on—

THE COURT: I know; but if you are in abeyance, is that recommending prosecution?

A No, sir.

THE COURT: That's all I want to know, is what you are recommending prosecution of, what samples?

A 132, 145 and 6—I believe that's the same product but different lots of it—133 and 144 and 141.

THE COURT: Well, now, what products do those involve? What are the trade names, or the common names, or what are they? Is it Frutex, Korleen and Aminex and Lecigen, L-e-c-i-g-e-n, so that I can—

A I can tell you, sir, if I can see the numbers there.

THE COURT: I have marked them off there.

[fol. 110] A Yes, sir.

THE COURT: How many products are involved?

A 132 is Frutex. It lists them right here, sir. 133 is Korleen, 134 is Aminex, 141 is Lecigen, 144 is Korleen—

THE COURT: Well, I am just asking you the product. I don't care about each sample. If I could get the names of the products here involved. How many are there?

A Five, sir.

THE COURT: All right.

A No, four.

MR. FRIEND: Four, your Honor.

A Four. One, two, three, four.

THE COURT: All right. Frutex, Korleen, Aminex—will counsel help me on this?

MR. FRIEND: Lecigen, Judge.

MR. BYERLEY: Lecigen, your Honor.

THE COURT: What are they, please, so I can get on with this?

MR. BYERLEY: Frutex—

THE COURT: Frutex, Korleen, Aminex—

MR. BYERLEY: And Lecigen.

THE COURT: Lecigen. When I ask something like this, I would appreciate some assistance here, rather than take my time to try and scan through tables and summaries, and so forth, so I can make some progress here.

[fol. 111] MR. FRIEND: Sir, Lecigen was in the indictment. Your Honor dismissed that count.

THE COURT: I see.

MR. FRIEND: So Lecigen is no longer in the case.

MR. BYERLEY: That's also true of Aminex, your Honor.

MR. FRIEND: Oh, no, no. Aminex is in Count No. 10.

MR. BYERLEY: But that is Aminex in New York City, not Aminex in Detroit.

THE COURT: The only two of these products recommended here for prosecution under this exhibit, then, that remain in this case is Frutex and Korleen?

MR. BYERLEY: No, sir; only Korleen remains. Your Honor has also dismissed Frutex.

MR. FRIEND: No. Frutex is in the case and Aminex is in the case.

THE COURT: Which counts?

MR. FRIEND: Frutex is No. 9, I believe, and Aminex is No. 10.

THE COURT: My gracious, don't you men agree on that?

MR. FRIEND: There isn't any question about that, your Honor. They are in the case.

MR. BYERLEY: Yes, your Honor; but they are in the case in a shipment to New York City involving Detroit [fol. 112] in no way, nor involving this man, nor involving the seizure—have no connection with this hearing at all.

THE COURT: I don't care about this man.

MR. FRIEND: Your Honor, that is a misleading statement. These shipments were made from the Detroit place. They are alleged to have been made from the Detroit place to New York. It doesn't make a darn bit of difference where they went to; it's where they came from, and he knows that.

THE COURT: Wouldn't that be true?

MR. BYERLEY: No, your Honor. We are concerned with the goods that were bought—

MR. FRIEND: Well, Mr. Daughters disagrees with you.

THE COURT: Now, wait. Are you prosecuting in this case for any shipments from here to New York?

MR. BYERLEY: Yes, your Honor.

THE COURT: Well, then, that's enough. That's all I want to know.

MR. FRIEND: That's why we are wasting a lot of time, Judge.

THE COURT: Well, I think we are.

MR. FRIEND: Count No. 9 is Frutex, your Honor.

THE COURT: You don't need to say any more. I just want this information. Let me look at it now. Apparently I have to read everything.

[fol. 113] (Short interruption.)

THE COURT: I have read the entire exhibit, the entire document, and I conclude that there is nothing in the deleted portions that are relevant to this hearing.

MR. FRIEND: Your Honor, to save time, we offer in evidence, with the stipulation of Government counsel, the excised portions of the summary and recommendation of the district office.

THE COURT: What was that; place in evidence the portion that has been handed to you?

MR. FRIEND: Yes, sir; which is the excised portion.

THE COURT: Have it marked.

(Photostatic copies of pages 1, 5, 6, 7 and 8 of the Summary and Recommendation of the Detroit District, dated July 28, 1961, were marked Defendants' Exhibit 8 by the reporter.)

Q (By Mr. Friend) Mr. Daughters, who is the author of Defendants' Exhibit 8?

A Mr. George Fowler, my deputy.

MR. FRIEND: Thank you.

I have one more question, your Honor, of this witness.

Q (By Mr. Friend) I show you, Mr. Daughters, an affidavit that was handed up to his Honor yesterday, which purports to be your affidavit, and direct your attention to [fol. 114] page 2. Is that your signature on that affidavit?

A Yes.

Q Who prepared this affidavit for you?

A I believe Mr. Byerley did.

Q Was it Mr. Byerley who inserted the following language in this affidavit:

> "I have no personal knowledge of any of the facts involved in the preparation and development of either the civil or criminal case. I cannot therefore present at the hearing any competent or relevant testimony."

A Yes.

Q And this is the statement you signed and swore to?

A Yes, sir.

MR. FRIEND: No further questions, your Honor. I believe the affidavit is already part of the file.

THE COURT: All right. Is there any cross-examination of this witness by the Government?

MR. TRUMBAUER: Yes, your Honor.

May I look at Exhibit 2?

THE COURT: What is that Exhibit 2?

MR. TRUMBAUER: Exhibit 2, your Honor, is a letter dated March 25th—

THE COURT: What is it?

MR. TRUMBAUER: It's a letter from Mr. Milstead [fol. 115] to the Detroit district, subject: Health Lecture at Detroit, Lelord Kordel.

THE COURT: All right.

CROSS-EXAMINATION

BY MR. TRUMBAUER:

Q Now, Mr. Daughters, I believe you stated on direct examination that the first indication you got which initiated your investigation of this case was this letter received from Mr. Milstead on March 25, 1960. Is that correct?

A Yes, sir; that's in 1960.

Q That's in 1960. And isn't it true that this letter directs you to look into certain lectures of Mr. Kordel on the possibility that certain products may be subject to seizures; isn't that right?

A That's correct; that's what it says.

Q Now, when you are talking about seizures under the Food & Drug Act, seizures of products, are you referring to a civil action or a criminal action.

MR. FRIEND: Your Honor, I object to that question. The word "seizure" was not used by him in that letter. It was used by Mr. Milstead.

THE COURT: No, I think it has a meaning that he may interpret.

MR. FRIEND: Yes, but—

[fol. 116] THE COURT: Objection overruled.

A Yes. Seizure is a common action in the enforcement of the Food & Drug Act.

Q (By Mr. Trumbauer) Is it a civil action or a criminal action?

A Yes, a civil action against merchandise.

Q Against merchandise. And so did you proceed in this investigation in the initial phases of it for the purpose of carrying out this concept of a possible civil action?

A Yes, indeed.

Q Now, how long have you been with the Food and Drug Administration, Mr. Daughters?

A Thirty-eight years.

THE COURT: Wait a minute. What was that question?

MR. TRUMBAUER: "How long have you been with the Food and Drug Administration?"

THE COURT: Oh.

Q (By Mr. Trumbauer) And during how many of those years have you been in the enforcement of the civil and criminal aspects of either the present Food and Drug Law or the previous Food and Drug Law?

A In one position or another, only thirty-eight years.

THE COURT: How long?

A Thirty-eight years.

Q (By Mr. Trumbauer) How long has the present Food and Drug Law, which provides for civil and criminal actions, been on the books?

[fol. 117] A 1938.

Q That's about twenty-seven years?

A Yes.

Q Can you tell me, based upon your experience, whether what happened in this case, namely, the institution of a civil action followed by the institution of a criminal action, is a usual or an unusual occurrence over those periods of twenty-seven years?

MR. FRIEND: I object to the question, your Honor. The issue is not whether it is usual or unusual, but whether it is proper or improper.

THE COURT: No, he may answer.

A It is routine. It is usual.

Q (By Mr. Trumbauer) Can you give us any rough estimate, based upon your experience, of the number of criminal cases which have been instituted, the percentage of those criminal cases which were preceded by civil actions emanating from the same facts and circumstances?

MR. FRIEND: Your Honor, I am going to object to the question.

THE COURT: Objection overruled.

A Percentage-wise, it is almost impossible to estimate. I would say that routinely, if there is nothing available for seizure, we would take the direct prosecution or injunction routes.

If there is merchandise for seizure, the district [fol. 118] will first recommend a seizure, and rather routinely within sometimes days, within sometimes weeks, we will recommend to the Administration or issue citation to the responsible parties with criminal action in view, if anything.

THE COURT: That's a 335 proceeding?

A Yes, sir.

Q (By Mr. Trumbauer) Then your answer is that where there is material subject to seizure, that normally the civil action would, in the normal course of events, precede any criminal action that might possibly develop?

A That's correct.

MR. FRIEND: Your Honor, I am going to object to Mr. Trumbauer restating what the witness said. Whatever he said, he said.

THE COURT: Well, he is entitled to ask leading questions. This is your witness.

MR. FRIEND: Well, your Honor, he is not my witnes. He is a hostile witness.

THE COURT: Well, he hasn't demonstrated any hostility to me.

MR. FRIEND: Well, he is employed by the other side.

MR. TRUMBAUER: Does that make him hostile?

THE COURT: That may be true, but this is your testimony. This is your witness. Objection overruled.

[fol. 119] Q (By Mr. Trumbauer) Now, in your direct examination by Mr. Friend, he referred to this sending of your file to New York in connection with the hearing. Do you recall that?

A Yes, sir.

Q And I think he asked you—and he emphasized this that it was very important—whether you sent both the criminal and the civil files to New York. Do you remember him asking you that?

A Yes, sir.

Q Did you in fact have two separate files?

A At that time, no. Routinely we will set up what we call a sample file, and this has to do with these samples that are collected on which action may be based and in this case was based, a series of samples. They were all put in the same jacket. When the seizure was made, the additional accumulated information was put in the same jacket. When the matter of citation under 335 came up, that was put in the same jacket. We had what we called a sample jacket. That was the jacket that was sent or jackets that was sent to New York. Sometimes they get so thick you've got to make more than one file of it. But it is essentially a chronological file of the papers that are involved in connection with the sample or samples.

Q Now, in your experience, Mr. Daughters, I presume you have been involved in a substantial number of both civil libel cases and criminal cases; right?

[fol. 120] A Yes, sir.

Q And you are familiar with the various sections of the Food & Drug Statute, aren't you?

A Yes, sir, I hope so.

Q Now, I am looking here at a copy of the libel of information which was filed in Civil Case No. 20215, which I think we are all agreed was the first court step in this proceeding, and I note that in the allegations con-

tained in the libel—and I would like you to look at this—reference is made to the fact that Korleen is a drug within the meaning of 21 USC 321(g) and is misbranded while held for sale after shipment in interstate commerce within the meaning of said Act as follows, and it refers to 352(a) and 352(f)(1), doesn't it?

A Yes, sir.

Q Now, I want to show you a copy of the—

THE COURT: Now, wait a minute. What were you referring to there?

MR. TRUMBAUER: I was referring to the libel in Civil Case No. 20215.

THE COURT: You are reading from the libel?

MR. TRUMBAUER: Reading from the libel.

THE COURT: All right.

MR. TRUMBAUER: For some reason, your Honor, the libel isn't in the—

THE COURT: No. Well, I don't think the proceed-[fol. 121] ings that went to the Court of Appeals are in there. I don't know whether they are back. They should be. The exhibits were back long ago. But sometimes those matters are either held separately in the Clerk's office or they first are held in the Court of Appeals for some time. I don't know where it is.

Now, you were directing the attention of the witness to which statutes?

MR. TRUMBAUER: Title 21, Section 352(a).

THE COURT: Where is that, what page?

MR. TRUMBAUER: Now, this would be in the civil case, your Honor.

THE COURT: Yes. Never mind the page, but what are the statutes again?

MR. TRUMBAUER: 21 USC 352(a) and 21 USC 352(f)(1).

THE COURT: All right.

MR. TRUMBAUER: And in view of the fact that the original libel is missing, I will mark this as an exhibit.

MR. FRIEND: We can stipulate, Mr. Trumbauer, to use a copy.

MR. TRUMBAUER: All right.

THE COURT: All right.

Q (By Mr. Trumbauer) Now, I want to refer you to the indictment in the present case No. 40236, and refer you to—pick any count here—Count 4 as an example, and [fol. 122] ask you to look at page 10 under Count 4 and ask you if you see the same references, namely, to 21 USC 352(a) and 352(f) (1) in the criminal case?

A Yes, sir.

Q So that isn't it true, Mr. Daughters, that within the purview of the Food & Drug Statute, in most cases the evidence that would be needed to prove the civil case might also well be used in the criminal case to prove misbranding; isn't that right?

MR. FRIEND: Your Honor, he is asking this witness to make a legal conclusion as to what proof—

THE COURT: Well, yes, I would sustain the objection.

MR. FRIEND: I will agree with that, your Honor. That's the point. If the same evidence was needed for both cases, the Government shouldn't be allowed to use answers that we give in interrogatories to assist them in proving the criminal case. Presumably they have—

THE COURT: What is the purpose of the objection, then?

MR. FRIEND: All right. I get the point.

MR. TRUMBAUER: My purpose in asking the question, your Honor, was to establish the routineness of this investigation, the routineness of the procedures, which I think is at the heart of this matter.

[fol. 123] THE COURT: Go ahead.

MR. TRUMBAUER: Did the Court sustain the objection?

THE COURT: Yes.

MR. FRIEND: I think his Honor did.

THE COURT: But counsel, in effect, admitted it, as far as I could see.

MR. FRIEND: Your Honor, I don't object to the point. I object to the question being asked of this witness.

MR. TRUMBAUER: Well, as long as we all agree on it, that is important.

THE COURT: I sustained the objection.

MR. TRUMBAUER: Thank you, Mr. Daughters. I have no further questions.

THE COURT: Is there anything further from this witness?

MR. FRIEND: Yes, sir.

MR. TRUMBAUER: Oh, one more question. Excuse me.

Q (By Mr. Trumbauer) In connection with your affidavit that Mr. Friend referred to, I think you said that you had no personal knowledge in connection with your affidavit. You have been referring to an awful lot of records here, Mr. Daughters. Has the knowledge that you have of this case been based upon these records primarily?

A That's all I have known about it, yes, sir.

[fol. 124] Q You didn't go out and investigate the case yourself, did you?

A No, sir. I am sorry I have been such a poor witness for Mr. Friend. I hadn't even had an opportunity to review the records.

MR. FRIEND: Well, I wouldn't concern yourself about how good or bad a witness you have been.

THE COURT: Any further redirect examination?

MR. FRIEND: Yes, sir.

REDIRECT EXAMINATION

BY MR. FRIEND:

Q Mr. Trumbauer suggested to you that the same evidence is needed to sustain a civil case as it is a criminal case, and that's a rather routine thing; isn't that correct?

THE COURT: I don't think that's what he said.

MR. TRUMBAUER: I didn't say that at all.

THE COURT: I won't make him respond to that, I don't think.

MR. FRIEND: All right.

Q (By Mr. Friend) Mr. Trumbauer suggested to you and pointed out to you that the civil case contained the charge of violation of 352(a) and the charge of violation

of 352(f) (1), and that the criminal case, Count 4 in particular, likewise charged the same offense. Isn't it also true that not only were the statutes—

MR. TRUMBAUER: I have to object to that, your [fol. 125] Honor. I didn't say charged the same offense. I said made reference to the same statute.

THE COURT: Well, I have heard it. It makes no difference. It is not a question. I have nothing to rule on here. The testimony speaks for itself, and paraphrasing by counsel means nothing to me except insofar as it is conceded or supported by the evidence.

Q (By Mr. Friend) Mr. Trumbauer suggested to you, Mr. Daughters, that the libel of information in the civil case and the indictment in the criminal case with respect to the product Korleen in Count 4 of the indictment in particular referred to the same sections of the Food & Drug Act, namely, 352(a) and 352(f) (1); is that correct?

A That's correct.

Q Isn't it also true that the actual facts upon which the civil libel case was based were identical with the facts upon which the charge of misbranding in the indictment with respect to Korleen were based?

A That is correct. It is also a fact that the law sets forth definitions of misbranding which involve the three sanctions.

Q That's correct. Isn't it a fact, Mr. Daughters, that you were having some difficulty or you were concerned about how you would sustain your burden in the criminal case of proving interstate commerce at the time you had under consideration whether you would recommend the filing of a criminal case?

[fol. 126] A This may have been. I don't recall. I don't believe there was any particular problem. Mr. Feldten was most cooperative.

Q Well, didn't you or your office in Defendants' Exhibit 8 make reference to the fact that with respect to the Korleen that was manufactured by Kapco, you might encounter some difficulty in establishing interstate character of these products; isn't that true?

A I think—

MR. TRUMBAUER: May the witness be given an opportunity to read what you are referring to?

Q (By Mr. Friend) Are you having difficulty answering the question without a document, Mr. Daughters?

A Well, I certainly don't recall this. It happened five years ago.

Q If you don't recall it, I certainly can allow you to refresh your recollection. I direct your attention to Defendants' Exhibit 8.

A And please bear in mind I didn't write this, either.

Q Well, you know about it, don't you?

A Yes, sir.

Q You didn't write it but you know personally from your discussions with your deputy about this matter, don't you?

A I believe I know it from this document which I read at the time.

(Short interruption.)

THE COURT: Read the question, please. The witness [fol. 127] has read the document.

(The following question was read by the reporter:

"Well, didn't you or your office in Defendants' Exhibit 8 make reference to the fact that with respect to the Korleen that was manufactured by Kapco, you might encounter some difficulty in establishing interstate character of these products; isn't that true?")

A Yes, that's true. We said so.

Q (By Mr. Friend) Now, isn't it also true that with respect to the Korleen manufactured by Freshman Vitamin Company, you didn't anticipate that you would have that difficulty because you had a companion civil case wherein that issue had been litigated, and you also had an order from Judge Levin concerning the defendants' necessity to answer certain interrogatories, didn't you? I direct your attention to page 6 and to page 8.

MR. TRUMBAUER: Your Honor, there is no reference to interrogatories in there. I object to a question—

MR. FRIEND: There is a reference, your Honor.

MR. TRUMBAUER: —which misreads the document. There is not a word of reference to anything about interrogatories.

MR. FRIEND: Well, you are not reading it correctly, Mr. Trumbauer. The witness is pointing to it himself.

THE COURT: Well, now, wait a minute. It doesn't say what is inferred.

[fol. 128] THE COURT: What?

A It doesn't say what is inferred here about interrogatories.

THE COURT: Well, let me see.

A Here is what the reference to interrogatories is (indicating).

MR. FRIEND: Your Honor, I have taken two parts of that report which refer to the civil case.

THE COURT: Go ahead.

A Now, I would like to know what the question is.

MR. FRIEND: Would you read the question, please.

(The following question was read by the reporter:

"Now, isn't it also true that with respect to the Korleen manufactured by Freshman Vitamin Company, you didn't anticipate that you would have that difficulty because you had a companion civil case wherein that issue had been litigated, and you also had on order from Judge Levin concerning the defendants' necessity to answer certain interrogatories, didn't you? I direct your attention to page 6 and to page 8.")

A The answer is yes.

THE COURT: All right.

Q (By Mr. Friend) Now, isn't it also true, Mr. Daughters, that one of the interrogatories that the defendants were required to answer is the following interrogatory:

[fol. 129] "Does the claimant admit that the article 'Korleen' tablets seized in this action was manufactured by Freshman Vitamin Company from raw materials received in interstate commerce as follows:

"(a) Korleen, Inositol and Methionine from New York Quinine and Chemical Works, New York, New York;

"(b) Niacinamide and Thiamine from Merck and Company, St. Louis, Missouri?"

A I don't believe I have ever seen the interrogatories, I wouldn't know what the answer is.

MR. FRIEND: Your Honor, to save time, and since the record is not back from the Court of Appeals apparently, can I have a stipulation from Government counsel that the written interrogatories be received as part of this record?

THE COURT: Any objection to that?

MR. TRUMBAUER: No, your Honor. It is part of the original record.

THE COURT: All right.

MR. FRIEND: And in that connection, your Honor, may I also have a stipulation from counsel that these written interrogatories were filed on January 9, 1961—

THE COURT: The record shows that. The docket sheet shows it.

MR. FRIEND: Yes, sir; but that Judge Levin's [fol. 130] decision came down on June 21, 1961; that the recommendation by Mr. Daughters' office for criminal prosecution and his reference in that recommendation to the necessity to respond to interrogatories—

THE COURT: Now, wait a minute. Judge Levin's decision was June what?

MR. FRIEND: 21, 1961.

THE COURT: Yes?

MR. FRIEND: The hearing on the motion was May 8, 1961. We had a hearing before Judge Levin on May 8, 1961. He rendered his decision on June 21, 1961. And then on July 28th, approximately one month later, Mr. Fowler recommended criminal prosecution wherein he made reference to the necessity to answer interrogatories.

THE COURT: Yes, that all appears.

MR. FRIEND: Yes, sir. Now, your Honor, I would also ask the Government to stipulate that the defendants, pursuant to Judge Levin's order—

THE COURT: When were the interrogatories answered?

MR. FRIEND: That's it—answered the interrogatories on September 5, 1961. Actually, your Honor, some of the questions were answered as Judge Levin had given us.

THE COURT: Well, the question here in issue.

MR. FRIEND: Yes, sir. That answer was stated as "Yes," was admitted as "Yes."

[fol. 131] THE COURT: But when was it answered?

MR. FRIEND: They were filed September 5, 1961. And I would like, your Honor, to have counsel's stipulation that the answers be received as part of this record.

THE COURT: Is there any objection? They would certainly be relevant, whatever they are, if you have the answers there, or copies of them.

MR. FRIEND: Yes, sir, I have the copies.

MR. TRUMBAUER: Yes, sir. These were all part of the official record of 20215, your Honor.

MR. FRIEND: I had hoped that if we had the whole file we could have stipulated that portion of it from the official file, but apparently we don't have it.

Q (By Mr. Friend) Now, another point, Mr. Daughters, is this: You told his Honor in response to Mr. Trumbauer's question that there was really one file in your office for a period of time for both the civil and the criminal case?

A Yes, sir.

Q Well, did there come a time when the file was put into two files?

A There came a time when it was put into four or five files, yes, sir.

Q Well, when did it cease to be part of one file?

A I think Mr. Fowler can answer that. I asked him that question yesterday, and he told me about a year or so ago.

[fol. 132] Q Didn't you assign Mr. Fowler to cover the civil case, not only the investigation of the civil case, but attendance at court hearings, participation in the various motions that were made, and to render assistance in the development and trial of that civil case?

A I didn't assign him. That's in his job description. He does this routinely.

Q Well, did he do it?

A I would assume he did. We are here.

Q I am talking about the civil case.

A Yes, sir.

Q And was he given the same assignment or performed the same duties in the criminal case?

A Yes.

Q And when you, Mr. Daughters, signed Defendants' Exhibit 1, which is the notice of hearing, informing the defendants that your decision as to whether the matter would be referred to the Department of Justice for prosecution would be based on the evidence at hand on January 19, 1961, you were referring, were you not, to the evidence in that file?

A Indeed. Certainly I would not be referring to something I didn't know about at all or Mr. Fowler didn't about.

Q Were you referring to the answers that might be given to interrogatories in the future which might become part of that file?

[fol. 133] A I didn't even know about interrogatories.

Q Well, you knew, did you not, that everything in the civil case becomes part of that one file which includes your criminal prosecution?

A I think I have already said that.

Q And you knew from the thirty-eight years of your experience with the Food and Drug Administration that whatever you could get in the civil case you could use in the criminal case, didn't you?

A Routinely.

Q Routinely. And you also know that counsel and lawyers throughout the country have been objecting to this routine practice, don't you?

MR. TRUMBAUER: Is counsel making a speech now, your Honor, or interrogating the witness?

MR. FRIEND: No, it's a question, your Honor.

THE COURT: Well, I will sustain the objection to that question.

Q (By Mr. Friend) Is it your contention, Mr. Daughters, that because it has been done as a routine practice over the years, that it is necessarily proper or legal?

A I'm not contending anything.

MR. TRUMBAUER: Your Honor, I object to the—

MR. FRIEND: You are not contending anything with respect to that. That's the question and that's the answer.

[fol. 134] THE COURT: He has answered it.

Q (By Mr. Friend) Now, the procedure that you follow as a routine practice in the district office of first starting a civil case and then routinely starting a criminal or recommending a criminal case and putting it all into one hopper, is the very procedure that was used in this case?

A I don't believe I said I routinely recommended a criminal case.

Q But when you do recommend it, it all goes into one hopper?

A Into a file, yes, sir.

Q And when you refer the matter to the Department in Washington with your recommendation for criminal prosecution, you send everything down there including the civil matters that have found their way into your file; correct?

A Indeed, yes. Many of them come from Washington rather than from us.

Q Well, I am just talking about what finds its way from your office to Washington.

A Interrogatories found their way from Washington to us.

Q How about the answers to the interrogatories; did they find their way from Washington?

A They found their way from the U. S. Attorney's office to Washington.

Q And how about your copies, do you get any?

A I believe we do.

Q And if you do get them, you send them along too, don't you?

[fol. 135] A I couldn't answer that. I would imagine not.

Q Well, what do you do, take papers out of your file that you send on to Washington with your recommendation for criminal prosecution?

A The U. S. Attorney will send copies of the documents to Washington. When they do, why should we? We don't.

Q You mean if they already have it, you might not duplicate the papers; is that it?

A That's what I am saying.

Q Now, since you have been associated with the Food and Drug Administration for thirty-eight years, you have a pretty good idea of how they operate in Washington when they receive your recommendations, don't you?

MR. TRUMBAUER: Your Honor, I am going to object to that. We have the witnesses available who operate in Washington and who can answer that question.

THE COURT: Wouldn't that be true?

MR. FRIEND: Your Honor, he opened the door on what is routine and what is not routine.

THE COURT: It isn't a question of opening the door. It is whether this witness knows.

Let me have the question.

(The last question was read by the reporter.)

THE COURT: Well, he may answer that question.

A I don't know how to answer it.

[fol. 136] THE COURT: Well, if you don't, you can say so, if you can't answer it. Is that what you mean, you don't know?

A I can say sometimes yes and sometimes no.

THE COURT: All right.

Q (By Mr. Friend) Well, do you know how they operated when they received your recommendation for criminal prosecution in this case?

A From the documents that came back.

Q Well, what procedure did they follow in this particular case that you know of for documents—

MR. TRUMBAUER: Your Honor, we are getting way out of line.

MR. FRIEND: Your Honor, I can't finish the question if I am interrupted by counsel.

THE COURT: What is the objection?

MR. TRUMBAUER: The objection is that this is not a relevant question even on redirect to ask this witness. It calls for a conclusion—

THE COURT: It isn't clear to me precisely what you are talking about here, what procedure did they follow? Who followed?

MR. FRIEND: Washington received the file with the recommendation from Mr. Daughters. He says that he knows from the correspondence that he received from Washington—

THE COURT: He may answer if he knows.

[fol. 137] MR. FRIEND: —what procedure they followed when they got your records.

A I know what the instructions are—

THE COURT: No. He is asking you in this case what procedure.

A I don't know, sir.

THE COURT: Well, say so.

MR. FRIEND: If you don't know, that's the answer. Your Honor, I have no further questions of this witness.

THE COURT: All right. Is there anything further from this witness?

MR. TRUMBAUER: No further questions.

THE COURT: You may step down.

(The witness was excused.)

THE COURT: Call your next witness.

MR. FRIEND: Mr. George Fowler.

THE COURT: We do have this civil file now, 20215. It was in the Clerk's office. I sent for it and it was here. Either counsel may use it. May it be considered a part of the record in this proceeding?

MR. TRUMBAUER: Yes, your Honor, as far as I am concerned.

MR. FRIEND: Yes.

THE COURT: All right, it may be.

[fol. 138] GEORGE R. FOWLER was called as a witness by the defendants, and, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. FRIEND:

THE COURT: What is your first name?

A George R. Fowler, F-o-w-l-e-r.

Q (By Mr. Friend) Would you state your address, Mr. Fowler?

A 14425 Chelsea, Detroit, Michigan.

Q And what is your position with the Food and Drug Administration?

A I am Deputy Director of the Detroit District of the Food and Drug Administration.

Q And how long have you held that position?

A Well, I have held that position or the assistant to the director since 1960, January 1960.

Q Did you have another position in that office prior to the time that you became Deputy Director?

A Yes. I was the Food and Drug Officer designated as Assistant to the Director up until about two years ago.

Q Mr. Fowler, are you familiar with the motion that Mr. Byerley filed with his Honor to quash the subpoenas in this case?

A I have read it.

Q You have read it?

A Or skipped over it.

Q When did you read it?

[fol. 139] A Within the last two days.

Q Did you read the part on page 2 where the following statement was made:

> "As shown by the attached affidavits, counsel for defendants have been given the names of these persons"—namely, the persons who have personal knowledge of the facts involved in this hearing—"and have been told that they and only they can testify to the facts involved."

A I did not read that part.

Q Well, just to make sure, would you look at it over here, directing your attention to page 2 of that motion which Mr. Byerley submitted to his Honor.

A What paragraph are you referring to?

MR. TRUMBAUER: Your Honor, I object to this. The motion is in the record. The witness said he hadn't read that part.

THE COURT: Well, it's all right. I don't know. I presume it is preliminary to something else, directing my attention to something.

MR. FRIEND: It is, your Honor.

THE COURT: What are you referring to?

MR. FRIEND: The top of page 2 of the motion, your Honor, the second full paragraph, there is a statement Mr. Byerley made that, "There are, however, persons [fol. 140] within the Food and Drug Administration who have personal knowledge of the facts involved in this hearing."

THE COURT: I don't see that. The top of page 2 of the motion to quash?

MR. FRIEND: Yes, sir. Here it is. The second paragraph from the top.

MR. TRUMBAUER: And that is a statement made or a motion made by Milton J. Trumbauer, Jr., your Honor, not by Edward Byerley. My name appears on it, and I prepared it.

THE COURT: Yes, I see it now. I thought that you enumerated the persons.

MR. FRIEND: Now, the persons enumerated in that motion, your Honor—

THE COURT: All right.

MR. FRIEND: —were Mr. Josh Randolph, Mr. Trumbauer and Mr. Byerley.

THE COURT: All right.

Q (By Mr. Friend) Now, you are familiar, Mr. Fowler, with the fact that the FDA had represented to his Honor in the motion that there were only three persons with personal knowledge of the facts of this hearing, namely, Randolph, Trumbauer, and Mr. Byerley. Is that correct?

A No, sir. I had not read the paper that closely.

Q Well, do you have any personal—

A As a matter of fact, I merely saw the paper yester- [fol. 141] day in the possession of Mr. Byerley, and the copies only came into the Detroit district office this morn-

ing from Washington, and I merely saw what they were and did not entirely read them, just skimmed over them.

Q Again, isn't it a fact—

MR. TRUMBAUER: Before counsel proceeds, your Honor, I must object on the grounds that he is misreading the motion, because on page 3 of the motion, in the paragraph that he refers to—

MR. FRIEND: I am referring to page 2 of the motion.

THE COURT: Page 2:

> "Counsel for defendants has been given the names of these persons and has been told that they and only they can testify."

MR. TRUMBAUER: To the facts involved. But the motion goes on on page 3, your Honor, it says:

> "These three persons are the only ones who have personal knowledge of the facts relevant to the filing of the interrogatories."

THE COURT: Well, all right.

MR. TRUMBAUER: And if you recall, the Court—we had perhaps too narrow a view of the Court's order at the time that we filed this motion, and that has since been expanded by the Court and we have conceded that. But at the time this motion was filed, we were referring only [fol. 142] to the filing of the interrogatories.

THE COURT: Well, go ahead.

Q (By Mr. Friend) Mr. Fowler, do you have personal knowledge of the facts concerning the decision to initiate a criminal or a civil case or of any phases or relationships between the two cases?

A I have knowledge based upon the records in the Detroit district file, yes, sir.

Q Well, who prepares these records?

MR. FRIEND: Your Honor, we have been hearing about no personal knowledge except from records.

Q (By Mr. Friend) Well, who prepares these records if it isn't you?

A The inspectors who collect the samples and the analysts who examine it.

Q Do you prepare any records?

A I prepare the summary and recommendation.

Q When you say personal records prepared by others, you are not deleting yourself from that category, are you?

A I have knowledge of the records, and also I have knowledge and I have personal knowledge of those that I prepared.

Q So you do have personal knowledge, then, of the facts relevant to this proceeding?

A Yes, sir.

THE COURT: Well, now, I think that my order is a [fol. 143] little bit misleading, and I don't care to have this point belabored throughout this hearing.

MR. FRIEND: All right, sir.

THE COURT: My decision did specifically limit it, or at the very conclusion of the decision limit it to the hearing with respect to the interrogatories. Some earlier language in the opinion was broader, I think.

Now, let's not belabor this thing throughout this entire hearing today.

MR. FRIEND: I don't intend to, sir.

THE COURT: I think that perhaps the Government were quite within their right in making the statement or in interpreting it, put it that way, for the purpose of the affidavits filed and the motion to quash the subpoena, of limiting it perhaps to the interrogatories.

MR. FRIEND: Sir, I mentioned it only because of the attitude—

THE COURT: All right. Let's not belabor this any longer.

MR. FRIEND: —displayed by the Food and Drug Administration.

THE COURT: Let's get to the facts, then.

MR. FRIEND: Yes, sir.

THE COURT: Let's stop this part of it.

MR. FRIEND: Yes.

[fol. 144] Q (By Mr. Friend) Mr. Fowler, referring to Defendants' Exhibit 8, I understand from Mr. Daughters that you prepared that report?

A Is that the summary and recommendation?

Q That's right.

A Yes, sir.

Q This recommendation for criminal prosecution, Mr. Fowler, is dated July 28, 1961; is that correct?

A May I see it?

MR. TRUMBAUER: Excuse me, your Honor. Just an aside for a moment.

Mr. Daughters will be available at his office. Is it all right if he goes back to his office?

THE COURT: Is that all right?

MR. FRIEND: Yes, sir.

THE COURT: All right, he may.

MR. TRUMBAUER: If you wish.

A That's the date that is on the first sheet, yes.

THE COURT: What was the answer?

A That's the date that appears on the first sheet of the summary and recommendation, July 28, 1961.

Q (By Mr. Friend) When did you actually prepare this report?

A I would guess some time within ten days previously.

Q Did you make a first draft?

A Sometimes I do; sometimes I don't. In this case I would guess that I did.

[fol. 145] Q Do you have that draft?

A No, sir.

Q What did you do with it?

A It is destroyed after the final draft is prepared.

Q Can you recall, Mr. Fowler, whether there was anything in the first draft pertaining to the seizure case that is not in the final draft that has been marked as Defendants' Exhibit 8?

A I have no actual recollection pertaining to the first draft. Ordinarily it is to take out clerical errors, misspelled words, and things of that sort.

Q Now, this report of yours, recommending criminal prosecution is based upon the investigation, I take it, of the facts which your office personnel conducted concerning the various sample numbers and products?

A Yes, sir.

Q Well, can you tell his Honor when that investigation was completed?

A I would judge about May 1960.

THE COURT: Wait a minute. What investigation was that?

A The ones pertaining to those samples covered by that summary and recommendation.

THE COURT: Your investigation was completed when, about?

A About May 1960.

[fol. 146] Q (By Mr. Friend) May 1960?

A Yes, sir.

Q So that actually, Mr. Fowler, you had all the facts in your possession upon which you could base your recommendation for criminal prosecution from May of 1960, almost fourteen months prior to the time you made the recommendation; is that correct?

A Yes.

Q Now, you were aware of the fact, were you not, that in January 1961, the defendants in the seizure action had been served with voluminous interrogatories requesting them to make various admissions, were you not?

A I was aware that they had been served with interrogatories by the libelant, the Government.

Q How did you become aware of that?

A It is the usual policy for copies of the interrogatories to be sent to the district.

Q And they are usually sent to the district at or about the time that they are actually filed?

A As they are sent to the United States Attorney, yes, sir.

Q The answer to my question, then, would be that it is true that in or about January 1961, you were aware of the fact that extensive interrogatories had been served requesting the defendants to make various admissions?

A I was aware.

Q Did you then become aware of the fact that the [fol. 147] defendants had made a motion before Judge Levin begging leave of the Court to defer the necessity to make response to those interrogatories because, at the very least, the Government was contemplating the bringing of a criminal action?

THE COURT: Now, wait a minute. What was the question?

(The last question was read by the reporter.)

THE COURT: All right.

A I was aware that such a motion had been filed with Judge Levin.

Q (By Mr. Friend) You were aware also of the fact, were you not, that indeed a Section 335 notice of hearing had been sent to the defendants on January 19, 1961?

A Yes, sir.

Q Were there any other notices of hearing sent to the defendants of which you were aware?

A Yes, sir.

Q Do you have those notices of hearings?

A I'm not sure that I have all of those notices of hearing.

Q Well, before we pull them out, how many more notices of hearings were sent to the defendants?

A During what period, and by what districts?

Q Any district that you know of after January 19, 1961.

MR. TRUMBAUER: If the witness knows.

MR. FRIEND: If he knows. That's my question. He can't answer if he doesn't know.

[fol. 148] MR. TRUMBAUER: He can only testify as to what is in his purview.

THE COURT: Well, insofar as he knows.

A I was aware that a notice of hearing had been sent by New York district to the defendant, and I was also aware that there was another notice of hearing sent to the defendant, I would judge about a year later.

THE COURT: That's a year later than what?

A A year after January 19, 1960, roughly. Sometime about a year later.

THE COURT: Where was that notice sent?

MR. FRIEND: That is not correct, your Honor.

A No, that's not correct. It was sent to the defendants sometime after April 1961. I don't remember the exact date.

THE COURT: All right.

MR. FRIEND: Your Honor, can I have a stipulation from the Government at this point as to the dates that the other two notices of hearings were sent to the defendants so we can save time, and also the submission of these notices of hearings as part of this record?

THE COURT: Well, the date of the hearing sent by this office, as I remember it, according to the testimony in the other motion, was January 19, 1961.

MR. FRIEND: That's right, your Honor. And it has come to my attention that there were two more sent at [fol. 149] or about the same time, which accounted for the consolidation of the notices of hearings to New York and the holding of same in New York.

Now, this is all preliminary to a line of questions that I want to ask of Mr. Fowler. This is probably as good a time as any to get the stipulation.

MR. TRUMBAUER: We will stipulate to the dates of the other notices of hearing.

THE COURT: What are they? You state them and see if they will stipulate. What are they?

MR. FRIEND: I don't them, your Honor.

THE COURT: You don't know?

MR. FRIEND: I don't know the dates. I am asking the Government to provide that information and stipulate.

MR. TRUMBAUER: He was counsel at the time. It is surprising he doesn't know them, your Honor.

THE COURT: Your client received the notices.

MR. FRIEND: Your Honor, I don't have them if I had them.

THE COURT: Well, you get the dates, then.

MR. BYERLEY: Your Honor, we don't have them right at present—

THE COURT: What?

MR. BYERLEY: These coming from the other districts—

THE COURT: Do you have it anywhere here that you [fol. 150] could—

MR. BYERLEY: Not at present, your Honor.

THE COURT: All right. Somebody else here says that they have it. I don't know what the gentleman has.

MR. TRUMBAUER: I think we do have it.

A I have a copy of the notice of hearing issued on September 25, 1961.

THE COURT: September 25?

A Yes, sir.

THE COURT: Well, that's the date of hearing. But the notice of hearing?

A The notice of hearing is dated September 25, 1961. The hearing was scheduled for October 10th.

THE COURT: You mean the 335 hearing?

A The second 335 hearing held by the Detroit district.

THE COURT: What is the first one? Let's get the first one.

A It was issued January 19, 1960, as I recall it.

THE COURT: Is that the date of it?

MR. FRIEND: January 19, 1961 is the date on the notice of hearing.

A 1961, that's right.

MR. FRIEND: That's the date of it, your Honor.

MR. TRUMBAUER: The date of the notice.

MR. FRIEND: That's right.

[fol. 151] THE COURT: January 19, 1961. The second one was what?

MR. BYERLEY: Your Honor, the second one was issued out of New York district office on April 19, 1961.

THE COURT: The first one was in Detroit, wasn't it?

MR. BYERLEY: Yes, your Honor.

THE COURT: All right. Now, what other?

MR. BYERLEY: And the third notice was issued out of Detroit district on September 25, 1961.

THE COURT: What is that? Why were there two of them out of Detroit?

MR. BYERLEY: The defendant made two series of lectures, your Honor.

THE COURT: What?

MR. BYERLEY: The defendant made two series of lectures, one in 1960, one in 1961.

THE COURT: Well, were there two hearings held?

MR. BYERLEY: Yes, your Honor. Two entirely different offenses a year separated.

THE COURT: I see. All right.

MR. FRIEND: If I may respond to your Honor's question as to why there was a September 1961 notice of hearing, my speculation would be that that is when—

MR. TRUMBAUER: Well, your Honor, I don't think [fol. 152] that's proper.

THE COURT: All I asked was whether more than one hearing was held.

Q (By Mr. Friend) Now, Mr. Fowler—

MR. FRIEND: Your Honor, may I withdraw the question for the moment.

I assume the Government will make available the notices of hearings and those two—

THE COURT: Do you need that? Is it necessary to have all that in the record if you have the dates? Aren't we more concerned with the dates here on the notices of hearing? I don't care, but neither do I want to build up a mountain of evidence here on something that isn't going to be of any assistance to me. Now, if you need it, put it in.

MR. FRIEND: I just wanted to look at it, your Honor. I probably won't put it in.

THE COURT: All right. If you have it, give it to him.

Q (By Mr. Friend) Now, Mr. Fowler, you were aware of the fact, therefore, that there were two notices of hearings pending which had been issued in January and April 1961 at the very time that the defendant had filed its motion before Judge Levin; correct?

A What was the date that they filed the motion?

Q April 10, 1961.

[fol. 153] A I can't answer that with certainty. I may have been aware of the notices of hearing by New York, but the second one from Detroit hadn't been issued at that time at all.

Q It was issued on April 19, 1961.

A September 25th, wasn't it?

Q No, no, no. Your counsel has just stipulated the second notice of hearing was in April 1961.

A That's the New York hearing.

Q I see. All right. I'm sorry if I confused you, Mr. Fowler.

Now, were you present in the courtroom when I argued the motion before Judge Levin on May 8, 1961?

A What did it pertain to?

Q Pertaining to our request that the necessity to answer interrogatories be suspended or deferred until after the criminal case had been decided upon?

A I may have been. I don't specifically remember it.

Q Well, if I were to tell you that you were there, you wouldn't be prepared to tell his Honor that that's incorrect?

A No, sir. It is my usual policy, if I am aware that there is a hearing of this sort over here, I usually attend. There have been several hearings in connection with this matter that I have attended, and some of them I may not have been there, I'm not sure.

Q Not only were you present when I argued that motion before Judge Levin, Mr. Fowler—

[fol. 154] MR. TRUMBAUER: I have to object right away, your Honor. That's assuming a fact that's not in evidence. He says, "Not only were you present, Mr. Fowler." Mr. Fowler just stated he doesn't know whether he was present or not.

THE COURT: Well, let me hear the question. Let me see what the question was.

MR. FRIEND: I didn't ask it yet, Judge.

THE COURT: You didn't ask a full question, did you?

MR. FRIEND: He interrupted me.

THE COURT: Well, go ahead with it, then. State it over. Complete it.

Q (By Mr. Friend) Isn't it also true, Mr. Fowler, that at the time of the May 8th hearing before Judge Levin, you already had known of the defendants' response to the notice of hearing which had been held in New York on March 8, 1961?

A Probably.

Q Why do you say probably? Don't you have any records that would tell you that you received a letter back from the New York Office, which is already in evidence, that the hearing had been held on March 8th, and sending you a transcript of the hearing?

A May I see it?

Q Referring to Defendants' Exhibit 7 (handing exhibit to the witness).

THE COURT: Now, wait a minute here. Let me get this.

[fol. 155] When was the hearing held before Judge Levin on your motion for a stay?

MR. FRIEND: May 8th, your Honor.

THE WITNESS: 1961.

MR. FRIEND: 1691.

A Yes, sir, this exhibit shows that this came in from New York and I no doubt saw it.

THE COURT: Now, the 335 hearing was held when?

MR. FRIEND: March 8th, your Honor.

MR. TRUMBAUER: I would like to request at this time, your Honor, that counsel, since this man has exhibited no hostility, stop treating him as a hostile witness.

THE COURT: Well, I would hope that it could be a little more restrained.

MR. FRIEND: Your Honor, it is my enthusiasm for the case.

THE COURT: There is no jury to impress here. This doesn't impress me. I have heard this for almost forty years.

MR. FRIEND: Your Honor, I know. I am only practicing eighteen years, your Honor, and one gets into certain habits after a while, and it is merely a matter of enthusiasm and nothing more, I assure you.

THE COURT: Well, be as restrained as you can.

MR. FRIEND: I believe in my client's cause.

[fol. 156] THE COURT: Let's see. This 335 hearing was held—

MR. FRIEND: March 8, 1961.

THE COURT: All right.

Q (By Mr. Friend) Mr. Fowler, when did you become aware that Judge Levin had denied the defendants'

motion to stay the submission of answers to those interrogatories?

A I don't remember the date.

Q Well, let's see if I can refresh your recollection, sir. Judge Levin's decision came down on June 21, 1961. I'm sure counsel would stipulate to that. Would that help to refresh your recollection as to when you learned for the first time that Judge Levin had denied our motion?

THE COURT: Judge Levin denied it on—

MR. FRIEND: June 21, 1961, your Honor.

THE COURT: June 21st. Do you remember when you heard about it?

A I had that information by September 1961, when I dictated that summary and recommendation. So it was between June and September. The specific date I learned of that I don't know.

Q (By Mr. Friend) Mr. Fowler, you might have misstated yourself. The summary and recommendation is dated July 28, 1961, not September.

A I accept that correction. Then it was between the date it was handed down and July 1961.

Q So that actually, Mr. Fowler, even though you had [fol. 157] had all of the facts in your possession for almost fourteen months upon which you wanted to base your recommendation for criminal prosecution, you didn't actually make the recommendation until after you had learned that Judge Levin had directed us to submit the answers to those interrogatories; isn't that true?

A Yes.

Q Now, Mr. Fowler, directing your attention to the actual recommendation, was there any particular reason that in making your recommendation to Washington that criminal prosecution be filed against these defendants, that you referred to the fact that more recently Judge Levin had denied the defendants' motion to stay in connection with the Government's interrogatories?

A Is there a reason?

Q Yes.

A Yes.

Q What was the reason?

A In any summary and recommendation, I include a resume on the status of any pending civil case.

Q You include the status of matters which you consider important?

A Of any pending civil case. A seizure would be considered important.

Q Well, did you include a reference to the fact that defendants had filed a notice of claim when the seizure started?

A The record already showed that.

[fol. 158] Q But didn't the record already show that defendants had filed a motion to the interrogatories, directed to the interrogatories?

A I am not sure that it did at that time.

Q Well, wouldn't it be fair to me to suggest to you, Mr. Fowler, that you put into your reports and recommendations the matters which you think are germane and important in the Government's decision as to whether they will adopt or reject your recommendation for criminal prosecution?

A Yes.

Q And you considered it important, I take it, therefore, to call Washington's attention to the fact that the Court had denied the defendants' motion to stay the submission of answers to interrogatories, and directed their attention to the fact that the defendants would have to answer these interrogatories?

A I considered it important because that was the last document appearing in the civil file in the Clerk's office at that time, which shows how far the case had advanced.

Q Well, in truth and in fact, Mr. Fowler, you called the Government's attention in Washington to really only three things that you considered important: namely, the fact that Bass & Friend, my law firm, had appeared for the defendants in the civil case; the fact that the defendants were litigating the issue of interstate commerce, though be it unsuccessfully; and the fact that the Court had directed the defendants to answer the more than [fol. 159] one thousand interrogatories which had been served. Those were the three things you considered important, isn't that true, and the only things you referred Washington to?

A I believe the paragraph deals with those three factors; possibly not in the same terminology that you stated it. I don't remember stating one thousand interrogatories in my summary and recommendation.

Q You referred to the interrogatories?

A Yes, sir.

Q The number of one thousand I have interposed. But the subject matters that I have articulated are the ones you considered important?

A The three items, yes, sir, which includes the fact that there was a civil case brought, and information as to the fact that an answer had been filed, and the last thing that appears in the record to show how far it had advanced.

Q You also called Washington's attention, did you not, to the difficulty that you might have or that the Government might have in trying to prove the various elements of the criminal case?

A In connection with those numbers in which we didn't proceed, yes, sir.

Q And in connection with those matters with which you did proceed—

A I stated—

Q —you in fact gave the Government a summary of [fol. 160] what you thought the evidence would be and how you would prove it?

A Yes, sir.

Q And in particular, you referred to whether you could or could not prove interstate commerce for the Kapco shipments and whether you could or could not prove interstate commerce for the Freshman Vitamin shipments?

A I referred to those two subjects, yes, sir.

Q You recognize, as an experienced deputy and investigator and employee of the Food and Drug Administration, that interstate commerce is one of the crucial elements in the Government's proof in a criminal case at this time?

A I recognize it, yes, sir.

Q So you knew, therefore, that the decisions which would come down in the civil case with respect to the

Freshman Vitamin shipments having moved in interstate commerce were of crucial importance to you in your decision as to whether you would recommend the bringing of a criminal case; isn't that true?

A No, sir, I don't think so.

Q Well, didn't you refer to the fact that your position is now pretty solid because in the civil case the interstate commerce matter had been litigated and decided in your favor?

A That related to the fact that the judge had ruled that the drug was in interstate commerce even though it was fabricated from interstate ingredients, yes, sir.

Q But didn't you consider that the matter which had [fol. 161] been under consideration with respect to that point in the civil case was of crucial importance to you as far as whether you would recommend the bringing of a criminal case, and in fact you refer to it in your report?

A The matter of whether or not we could establish interstate commerce was considered crucial, yes, sir, in connection with all the numbers.

Q And in particular with respect to Korleen?

A Yes, sir.

Q So that was, as I say, one of the important matters you directed Washington's attention to; and the other matter you directed Washington's attention to, or one of the other matters, was the necessity of the defendants to answer the interrogatories. Now, did you at any time receive a copy of the defendants' answers to the interrogatories?

A Yes, sir.

Q When did you receive it? To help expedite the answer to that question, let me tell you that the first set of answers to the interrogatories was filed in September 5, 1961, together with objections to certain of the interrogatories which Judge Levin allowed us to make on grounds other than the fact that a criminal case was being contemplated.

Now, with that information, Mr. Fowler, does that help you recall when you received a copy of our answers to the interrogatories?

[fol. 162] A What was that date again, Mr. Friend?
Q September 5, 1961.
A What date did I receive them?
Q Yes.
A September 27, 1961.
Q Who sent them to you?
A My recollection is that I visited the officer of Mr. Trumbauer and picked up his file copy at that time.
Q Well, had he invited you to do that, or did you just come down in the normal course of your duties and check out the file, so to speak?
A What I had done, as I recall, was I first visited the office of the Clerk and saw that such answers had been filed, and knowing that I did not have—that there was not a file copy available, I next visited Mr. Trumbauer, and he did not have extra copies and I borrowed his copy.
Q What did you do with the answers?
A I made two photocopies, sent those to Washington, the Food and Drug Administration, and returned the copy that Mr. Trumbauer had to his office.
Q Is there anyone in particular that you sent the interrogatories to?
A Yes, sir.
Q Do you have a letter of transmittal?
A Yes, sir.
[fol. 163] Q May I have it, please, to look at?
A (Document handed to Mr. Friend.)
MR. FRIEND: Now, would you mark this.

(A carbon copy of a letter dated September 27, 1961, to Administration, attention Josh Randolph, from George R. Fowler, was marked Defendants' Exhibit 9 by the reporter.)

THE COURT: Do you offer it?
MR. FRIEND: I offer it.
MR. TRUMBAUER: No objection.
THE COURT: It may be received.
Q (By Mr. Friend) Mr. Fowler, before you went down to the office of Mr. Trumbauer to pick up the answers to the interrogatories, you had a conversation on

the telephone with a Mr. Josh Randolph in Washington, did you not?

A It is my recollection that I did, sir, yes, sir. I believe that memo so states.

Q And who is Mr. Josh Randolph?

A That gentleman sitting back there in the second row on the left side.

Q What position does he hold with the Food and Drug Administration, or did he hold in 1961?

A At that time he was in the Division of Regulatory Management. I believe that was the title.

Q Did he have anything to do with criminal cases?

A Yes, sir.

[fol. 164] Q Did he have anything to do specifically with the working up of a criminal case against the defendants here?

A I assumed from the papers I had that he did. I didn't participate with him and have no personal knowledge.

Q Well, you had a conversation with him shortly before you went down to Mr. Trumbauer's office to get the answers to the interrogatories, did you not?

A Yes, sir.

Q Did he call you or did you call him?

A I don't recall right offhand.

Q Did that conversation concern itself in any way with the interrogatories? And I show you the letter if you don't recall, Mr. Fowler, to help you refresh your recollection.

A I believe it related to interrogatories, yes.

Q Well, would you tell his Honor what he said to you about them and what you said to him about the interrogatories.

A Well, it is my recollection that in the telephone conversation—

MR. TRUMBAUER: Well, your Honor, we have Mr. Randolph here. It isn't necessary to get into hearsay testimony.

THE COURT: Well, this witness has first-hand—he was on the other end of the line, wasn't he?

MR. TRUMBAUER: Yes. He can testify to what he said.

THE COURT: Well, he can testify to what they both said, can't he?

[fol. 165] A It is my recollection that at some time previously the General Counsel had forwarded a motion to dismiss the answer.

THE COURT: What was that again, now?

A It is my recollection that some time previously the General Counsel of the Department had forwarded to Mr. Trumbauer a motion to forfeit on the basis that the claimant—

THE COURT: Wait a minute. A motion to forfeit, what do you mean by that?

A To condemn the goods.

THE COURT: Oh.

A On the basis that the claimant had not answered the interrogatories which had been propounded by the Government; and Mr. Randolph requested that I visit the office of Mr. Trumbauer and the Clerk to see if such answers had been filed or if this motion had been filed.

Q (By Mr. Friend) Let me see if I understand this. Mr. Randolph is not in the office of General Counsel?

A No.

Q Mr. Randolph notified you, I take it on the phone, that General Counsel, of which Mr. Byerley is a part?

A Yes, sir.

Q And was a part, had filed a motion to declare a default against the defendants for failure to respond to the interrogatories in accordance with Judge Levin's order?

A He had forwarded such motion to Mr. Trumbauer, as I recall it.

[fol. 166] THE COURT: Who had?

A The General Counsel's office.

MR. FRIEND: The General Counsel's office had forwarded such a motion.

THE COURT: Oh, the General Counsel's office. All right.

Q (By Mr. Friend) Now, you didn't get a call from General Counsel's office about that; you received a call or had a conversation with Mr. Randolph, who handles criminal matters, this criminal matter against the defendants; correct?

A Yes, sir.

Q And Mr. Randolph, who handled this criminal matter against the defendants, wanted you to find out whether the defendants had in fact submitted their answers?

A Yes, sir; or if this motion had been filed, just what the status was.

Q And in accordance with his instructions and pursuant to the telephone conversation that you had with him, you went down to visit Mr. Trumbauer's office and check his files to see whether (a) the answers had been filed or (b) the motion to declare a default had been filed or what its status was; correct?

A Initially I visited the office of the Clerk of the Court and examined the Clerk's file.

Q When did you make that examination?

[fol. 167] A The same day.

Q When was that?

A Well, this memo is dated September 27, 1961, and I state that "I today visited," so I would assume from that it was on Septmeber 27th, September 27, 1961.

Q Now, when you had this conversation with Mr. Randolph, did the subject come up that the Food and Drug Administration had just issued another notice of hearing under 335?

A I believe it was mentioned.

Q Well, would you tell his Honor just what it was that was mentioned about this third notice of hearing. If you will recall, Mr. Fowler, we had one on January 19, 1961, we had one on April 19, 1961, and I don't remember the exact date but we had one in September of 1961, the same month in which you had a conversation with Mr. Randolph.

Now, would you tell his Honor what you and Mr. Randolph discussed about that notice of hearing that had been issued in September.

A I think the best way is to read the paragraph that relates to it.

Q No. If you can't recall, Mr. Fowler, you may use the letter to refresh your recollection, but first try to give us your best recollection without referring to the document.

A I have no recollection other than what is shown in this memo.

Q All right. Now, rather than read this letter, just look at it, if you will, and tell his Honor—that is, use [fol. 168] it to refresh your recollection. Don't read it.

A I advised Mr. Randolph—

MR. TRUMBAUER: Your Honor, the document is in evidence. He says he has no independent recollection.

THE COURT: No, he may answer.

A I advised Mr. Randolph that the notice of hearing on the second Detroit hearing, which was September 1961?

THE COURT: September 5th, wasn't it? It shows that date in the file.

A (Continuing) Had been issued.

MR. FRIEND: September 25th.

A Yes, that's right, September 25th.

Q (By Mr. Friend) Why did you tell him it had been issued? Had he asked you to send one out before?

THE COURT: Now, wait a minute. What was it again, the nature of your conversation?

A I told him that it had been issued; that this covered the samples collected during a series of lectures given by Kordel in April 1961.

Q (By Mr. Friend) Involved in this indictment, Mr. Fowler?

A Yes, one count is.

Q Is that a Korleen count?

A It's a Korleen count.

Q How about any Frutex counts?

A That's been dismissed.

[fol. 169] Q But it was originally involved in the indictment?

A Yes, it was originally involved.

Q Go ahead. I'm sorry if I interrupted you.

A And I also told Mr. Randolph that we were taking steps to get the records covering this shipment.

THE COURT: What shipment, of what?

A Of Korleen and Frutex.

Q (By Mr. Friend) Now, this was in the very same conversation that you have been telling his Honor about,

wherein you were referring to the interrogatories not having been filed, or the answers thereto not having been filed?

A Well, I think he asked the status of this matter during this conversation.

Q Yes. It was in the same conversation?

A Yes, sir.

Q Now, sir, was he surprised when you told him that you had sent out another notice of hearing for Korleen and Frutex on September 25, 1961?

THE COURT: What was that question?

Q (By Mr. Friend) Was Mr. Randolph surprised that your district office in Detroit had sent out another notice of hearing for Korleen and Frutex?

MR. TRUMBAUER: Objection, your Honor.

THE COURT: That calls for a conclusion. Did he say so?

[fol. 170] A I don't recall that he expressed any surprise. I have no knowledge of his state of mind at that time.

THE COURT: I guess that would be something you wouldn't know.

A No, sir.

THE COURT: We will take a recess.

(A recess was taken.)

THE COURT: All right, proceed, gentlemen.

Q (By Mr. Friend) Mr. Fowler, before the recess we were talking about your conversation with Mr. Randolph and the fact that on September 25th a third notice of hearing for Korleen and Frutex had been sent out to the defendants. Who had initiated the sending of that notice of hearing?

A It was sent by Detroit district, but it is my recollection that we issued the notice of hearing on instructions from Mr. Randolph.

Q Were those instructions written?

A It is my recollection that the instructions were

given during the course of a telephone conversation with Mr. Randolph.

Q Is this a different telephone conversation from the one you were telling his Honor about?

A It could have been the same, it could have been different. It was about the same time.

Q Well, let's become a little more specific and precise [fol. 171] about that. You went up to see Mr. Trumbauer on September 27, 1961. The letter refreshed your recollection to that effect. I take it you had the conversation with Mr. Randolph—

A Before that time.

Q Yes. And was it a day or two before?

A I would judge it was about five or six days before. It was close to the time of this other conversation. It could have been the same one.

Q Well, in your conversation with Mr. Randolph, didn't you mention the fact that the third notice of hearing had already gone out?

A Yes, sir, possibly I did.

Q Well, if the third notice of hearing had already gone out and it was dated September 25, 1961, then you must have had a prior conversation with Mr. Randolph wherein he had instructed you to send out a third notice of hearing?

A It could have been the same. Now, this letter, you will remember, was dated the 27th and I referred to our telephone conversation, as I recall it, on about the 22nd, isn't that right?

Q I think you have the letter, Mr. Fowler. Excuse me.

A It was offered into evidence.

Q Mr. Fowler, I believe you might have it up at the witness chair.

A I don't see it.

MR. BYERLEY: I believe it is before the Court there.

[fol. 172] Q (By Mr. Friend) Mr. Fowler, you had it last, because I recall handing it to you to use to refresh your recollection. You might have mixed it up with your files.

A I don't see it. I think I gave it back.

Q I don't see it.

A Ed, bring me that briefcase. It might have gotten in there. I put three files back in there.

(Short interruption.)

A Yes, sir, I have it.

Q This exhibit, Mr. Fowler, refers to a telephone conversation of September 22nd?

A Yes, sir.

Q And you refer to the fact that the citation has already been issued to the defendants in Korleen and Frutex?

A Yes, sir.

Q I take it, therefore, that when you had this conversation on September 22nd and informed Mr. Randolph that you had already issued the citation, that you must have had another conversation prior to that time at which time he had instructed you to in fact issue the citation?

A I don't agree with that. This memo is dated the 27th. That's when I wrote the memo, and I say, "As requested in our telephone conversation relative to this pending case on September 22, citation has now been issued," which indicates to me that it was on September 22nd in a telephone conversation that he instructed me [fol. 173] to issue the notice of hearing.

THE COURT: What date, September 22nd?

A September 22, 1961.

Q (By Mr. Friend) So that, Mr. Fowler, on September 22nd, you had a conversation with Mr. Randolph wherein he first instructed you to issue another citation for Korleen and Frutex, and he also asked you to see whether answers had been filed to the Government's interrogatories and what the status was of the motion which General Counsel's office had filed to declare a default for failure to have answered the interrogatories. Am I correct?

THE COURT: What was the question, now?

(The last question was read by the reporter.)

A Yes, generally.

Q (By Mr. Friend) And after the telephone conversation wherein these three matters were discussed, you proceeded to send out a notice of hearing for Korleen and Frutex, and you also proceeded to visit Mr. Trumbauer's office to obtain answers to the interrogatories?

A To obtain any records that were there that we were not aware of, yes, sir, that we did not have copies of. In other words, I had no knowledge, at the time I received that telephone conversation, whether or not the interrogatory answers had been filed.

Q Yes. That's what you were asked to find out?

[fol. 174] A Yes, sir.

Q And you then went down, as I say, to Mr. Trumbauer's office, reviewed the file, and you found that the file did contain answers to libelant's interrogatories covering both the original set of interrogatories and the additional interrogatories; correct?

A I believe there was some objections to certain interrogatories, but there was an answer in there to Government's interrogatories, the first and the second set in part. As I recall, there was an argument later about whether certain of these interrogatories had to be answered.

Q And you then borrowed Mr. Trumbauer's copy of the answers to the written interrogatories and the additional interrogatories which had been field, you made two copies of those answers and you forwarded them to Mr. Randolph?

A Yes, sir, to Washington, to Food and Drug in Washington, probably to the attention of Mr. Randolph.

Q And so there is no misunderstanding about this, I hand you a copy of the claimant's answers to libelant's interrogatories in Civil No. 20215, and ask you if this is in fact a true copy of what you had made two copies of and sent on to Mr. Randolph?

A To the best of my knowledge, yes.

Q And not only did you send him the answers to the interrogatories, Mr. Fowler, you also sent him three copies of the notice of hearing that had been issued on September 25, 1961, did you not?

[fol. 175] A Yes, sir.

Q And you sent to the very same individual—in fact, you refer to him specifically in the letter as "Dear Josh," and that's Josh Randolph—

A Yes, sir.

Q —two copies of what you refer to as an assignment memo, Detroit District/Chicago District dated September 27, 1961, No. 20-119 R?

A Yes, sir.

Q That pertained to Frutex, did it not?

A Yes, sir.

Q Well, what is assignment memo?

A It's a request to collect a sample or to secure records or to make some other investigation.

THE COURT: Mr. Fowler, will you keep your hand down and don't talk into this. It creates an overtone. It is adjusted for normal conversation. Don't talk too directly into the microphone.

A An assignment memo would be a request to collect samples, to make an investigation, to secure records—something of that sort in connection with our work.

Q (By Mr. Friend) Now, was this assignment memo relevant to the criminal case?

A Yes.

Q Did you receive a response from Mr. Josh Randolph [fol. 176] to your submission to him of answers to interrogatories and notice of hearing and the assignment?

A Not that I recall.

Q Did you have any conversations with him after that?

A I have had numerous conversations with Mr. Randolph over various and sundry matters relating to this and other cases.

Q Well, I don't mean to—perhaps it is my fault. I asked the question improperly.

Did you discuss with Mr. Randolph, after you submitted this, anything about the civil case and the criminal case which the Government was getting ready to file against the defendants, including the answers to the interrogatories?

A I undoubtedly discussed this case with Mr. Randolph after that date pertaining to different matters.

Q Well, the matters that I am interested in are the matters that were discussed as to the civil and the criminal case.

A Yes, both cases were then open, and I could have discussed matters pertaining to the civil and the criminal case with Mr. Randolph.

Q Do you recall any discussion with Mr. Randolph about the answers which had been submitted to the interrogatories?

A No, sir.

Q Did you discuss with Mr. Randolph the fact that Judge Levin had ordered that answers be submitted to certain of the other questions to which defendants had [fol. 177] made objection on grounds other than the fact that the Government was contemplating a criminal case?

A I may have. I don't recall specifically.

Q Well, do you discuss this with him?

A Because he was the person in the Division of Regulatory Management who was handling both the civil and the criminal case for the Food and Drug Administration.

Q Well, I thought General Counsel was handling the civil case and that Mr. Randolph was just handling and whipping into shape the criminal case. Isn't that true?

A I don't know what you thought, Mr. Friend.

Q I can understand that. You mean, sir, that even though a civil action was pending in this Court, which was being handled by General Counsel's office, Mr. Byerley, together with the United States Attorney's office in Detroit, yet there was one individual in Washington by the name of Josh Randolph who really had responsibility for both cases?

A Yes, sir.

Q And this gentleman who had responsibility at the FDA for both cases was the individual who in fact made the decision to your office that criminal notices of hearings should be sent out to these defendants concerning Korleen and Frutex and the other products which are the subject of this indictment; isn't that true?

A As far as I know, Mr. Randolph dictated the letter [fol. 178] for Mr. Milstead's signature. That's hearsay

knowledge. And I know that he told me on the telephone to issue the second notice of hearing.

Q Well, we heard from Mr. Daughters yesterday about a gentleman by the name of Milstead.

A He signed the letter on the first notice of hearing.

Q Well, is Mr. Randolph connected with Milstead in any way?

A Mr. Milstead at that time was the head of that bureau.

THE COURT: Head of what?

A Of the Division of Regulatory Management of the Food and Drug Administration.

Q (By Mr. Friend) And Mr. Milstead was in charge of that bureau, and Mr. Randolph worked within that bureau under Mr. Milstead handling both the civil and the criminal case?

A That's my understanding.

Q And when you received instructions from Washington to file a criminal notice of hearing or to investigate whether a seizure case should be brought or to pick up samples or to attend lectures or to pick up books, those instructions came either from Mr. Milstead or Mr. Randolph?

A Not always, no, sir.

Q Who else would have issued such instructions?

A Well, instructions to attend the lectures, as an example, would have come from DFO at that time, Division of Field Operations, some individual in that section in Washington.

[fol. 179] Q Well, as far as the gathering together of evidence to consider whether a civil case should be brought or a criminal case should be brought, that would have come from Mr. Milstead's department?

A Yes, sir.

Q And all of the papers that are pertinent to the the civil case, such as answers to interrogatories, motions, the interrogatories themselves, in fact would have come from Mr. Milstead's office, and in this case in particular, Mr. Randolph?

A It is my understanding that they participate. I don't have actual knowledge of who prepares the inter-

rogatories. It is my understanding that ordinarily they are prepared by someone in Mr. Milstead's office, possibly in conjunction with someone in the General Counsel's office. I have no actual knowledge of that.

Q But in any event, whatever papers that are pertinent to the civil case at one point or another find their way to Mr. Milstead's office and the individual in his office who is handling the civil case?

A I assume so, yes, sir.

Q And this one individual, therefore, is the starting point for the decision that is ultimately made as to whether either a civil case or a criminal case will be filed?

A One individual, usually on any one case he handles it. Now, who he may consult with I wouldn't have any [fol. 180] knowledge first-hand.

Q But in this case we at least know that Mr. Randolph and Mr. Milstead were party to that initiation of proceedings?

A Yes.

Q And since the two cases were almost identical, certainly with respect to Korleen and Frutex, the same gentleman was in charge of both?

A The same gentleman handled both the civil and the criminal matter to my knowledge, yes, sir.

Q Isn't it also true, Mr. Fowler, that the answers to the defendants' interrogatories which had been filed in the civil case had in fact been sworn to by Mr. Milstead?

THE COURT: Had what?

Q (By Mr. Friend) Had in fact been sworn to by Mr. Milstead.

A I believe that's true, yes.

Q So that all of the information that the Government had concerning the civil case, all of the information which had been obtained from the defendants in the civil case, and all of the information which the Government had or thought they needed to bring the criminal case was reposed in one or two individuals, namely, Mr. Randolph—was reposed in at least one individual, Mr. Randolph or Mr. Milstead?

MR. TRUMBAUER: Your Honor, I am going to object to this. The question has been asked about five times.

THE COURT: I think it has been asked and an-
[fol. 181] swered two or three times, hasn't it? Let's go on to something else. I've got other things to do, and this is sort of a preliminary hearing to the trial of this case, and I would like to go on as expeditiously as possible.

MR. TRUMBAUER: And we have Mr. Randolph here. He can testify.

THE COURT: Yes, he is here.

MR. FRIEND: Your Honor, I don't want to be argumentative, but I am not impressed with their anxiety from the very beginning that I put Mr. Randolph on. I'm not objecting to having him on, but I'm not at liberty to examine their records.

THE COURT: Just go ahead. Just stop the colloquy and go ahead, please.

Q (By Mr. Friend) Mr. Fowler, you in your letter of transmittal to Mr. Josh Randolph refer to the fact that your cursory examination of the answers to the interrogatories indicated that they were very incomplete.

A Yes, sir.

THE COURT: That they were what?

MR. FRIEND: That they were very incomplete.

Q (By Mr. Friend) Did you study them?

A I read them, yes, sir.

Q Did you at any time thereafter learn that the defendants had submitted additional answers?

[fol. 182] A I believe so, yes, sir.

Q When did you learn that?

MR. FRIEND: Your Honor, to save time, the supplemental answers to the interrogatories were filed approximately one year later, on September 24, 1962.

MR. TRUMBAUER: So stipulated. It is in the record.

A I don't remember specifically.

Q (By Mr. Friend) Well, that's the stipulation.

A Yes, sometime shortly after that date, I would assume. My recollection is in this case Mr. Trumbauer forwarded me copies of those.

Q Well, did you receive any written letters, written communications or telephone calls from Mr. Randolph's

office or Mr. Milstead's office between the time of the submission of the first answers to him in 1961 and the filing by the defendants of the second set of answers concerning the interrogatories?

A Not that I recall.

Q Did you receive any information from Mr. Randolph's office or anyone in Washington as to what the delay was in making a decision as to whether to recommend to the Department of Justice the filing of an indictment against the defendants for the Korleen and Frutex?

A I don't recall they made any explanation for the delay, no, sir.

THE COURT: Wait a minute. What was that ques-
[fol. 183] tion? Who made the explanation? What was the question?

(The last question was read by the reporter.)

THE COURT: All right.

Q (By Mr. Friend) Now, do you know it to be a fact that when the Government appeared before Judge Levin in May of 1961 and submitted a brief to Judge Levin and made oral argument before Judge Levin, that a representation had been made to Judge Levin that the decision to bring a criminal case and to recommend it to the Department of Justice after a notice of hearing usually takes six months to a year?

A I don't specifically remember that that was brought to the Judge's attention.

Q Well, you read the Government's brief that they submitted to Judge Levin at one time or another, didn't you?

A I ordinarily read the briefs, yes, sir.

Q And at the time that the matter was argued before Judge Levin on May 8th, there were two notices of hearings that had gone out, one in January of 1961 and one April 1961?

A Yes, sir; if you are considering the one from New York.

Q Yes. So that if the normal procedure referred to in the Government's brief, which is part of the file, your

Honor, that it usually takes six months to a year to make the decision to Justice to bring or not to bring an indictment had been carried out, the decision would have been made either in January of 1962 or April of 1962; isn't that true?

[fol. 184] A I don't see anything wrong with your mathematics, although I think possibly in certain involved cases that those dates may not hold true.

Q In any event, you are familiar with the fact, are you not, Mr. Fowler, that a conference was held with Judge Levin—I think it was a pre-trial conference—on May 21, 1962. I believe you were present?

A I believe so, yes, sir.

Q With counsel for the Government?

A Yes, sir.

Q Wherein the subject of the answers to the interrogatories had been raised by the Government, and wherein the Government had stated to the Judge that the defendants had not yet completed the submission of their answers.

A I believe that was brought up in the hearing, yes, sir.

Q And you do recall also that Judge Levin on May 21st in his chambers during the pre-trial conference gave both sides the opportunity to either withdraw the interrogatories or some of the objections to some of them, and insisted that the answers to these interrogatories be filed forthwith?

A I believe so, yes, sir.

Q And after Judge Levin made that direction in his chambers on May 21, 1962, did you communicate that information to Washington?

A Ordinarily, at any time I attend a pre-trial con-

[fol. 185] ference or any other court function, I send a memo on it to Washington.

Q Do you have the memo?

A I do.

Q May I have it, please?

A That was May 1962, wasn't it?

Q That's right, sir.

MR. TRUMBAUER: May I examine it first?

(Document handed to Mr. Trumbauer, examined, and handed to Mr. Friend.)

MR. FRIEND: Would you mark that, please.

(A copy of a letter dated May 23, 1962, to Administration, attention Mr. Randolph, from George R. Fowler, was marked Defendants' Exhibit 10 by the reporter.)

MR. TRUMBAUER: Your Honor, my only objection to this—Mr. Friend, I believe, wants to offer it in evidence—is that it is a report of a pre-trial conference with Judge Levin in his chambers.

THE COURT: What is your objection?

MR. TRUMBAUER: Well, it may be that—I don't know if this is a legal objection or not, but it may be that since it was in chambers by a judge—

THE COURT: Oh, pre-trials are only held in chambers for the convenience of the Court and counsel. They are open hearings.

MR. TRUMBAUER: All right. Then I have no ob-
[fol. 186] jection.

THE COURT: It is a court proceeding.

MR. FRIEND: I offer this letter, your Honor, in evidence as Defendants' Exhibit 10.

Q (By Mr. Friend) On May 23rd, Mr. Fowler, you got off a letter to Mr. Randolph again, who was working on the criminal case, and made various comments about the answers to the interrogatories and the interrogatories themselves, did you not?

A If it is in there, yes. I haven't read that memo in some time myself.

Q Read it now and refresh your recollection preliminary to some questions.

A (After examining exhibit) The interrogatories are mentioned and what took place relative to the interrogatories during the pre-trial, yes, sir.

Q You reported to Mr. Randolph that Judge Levin was not very sympathetic to the Government's insistence that the defendants answer these additional interrogatories to which they had objected.

MR. TRUMBAUER: Your Honor, I object. What has that got to do with the issue at hand, as to Judge Levin's sympathy?

THE COURT: Well, I don't know. Does the letter so state, is that it?

MR. FRIEND: Your Honor, I'm not inquiring as to [fol. 187] what Judge Levin actually said. I want to know what he told Mr. Randolph was said so that we know what happened after that.

A I report here that Judge Levin commented that he saw no purpose in claimant having to answer certain interrogatories, namely, 32, 44 and 50, yes, sir.

Q (By Mr. Friend) Did you make a recommendation to Washington as to whether you should insist upon defendants answering the other interrogatories?

A No, sir.

Q Isn't it true that you reported that Judge Levin had considered this to be a relatively simple case with a relatively simple issue, and he saw no special purpose in having the defendants answer the lengthy and somewhat involved interrogatories?

A That's what I put in there, yes sir, as the expression made by Judge Levin as I understood it.

Q And did you also tell Mr. Randolph that some statement had been made by Judge Levin about the desirability of the Government withdrawing the interrogatories that we had objected to?

A I believe there was some statement to that effect, yes, sir.

Q Now, did you ever receive an answer from Mr. Randolph?

A Not to my knowledge, no, sir.

Q Well, do you know whether Washington had expressed any opinion as to whether the interrogatories should be withdrawn?

A It is my recollection that shortly after this conference, a consent decree was entered, which would make [fol. 188] the interrogatories more or less not apply, since this was discovery in the civil case.

MR. FRIEND: Well, I think you are getting ahead of yourself on the chronology, Mr. Fowler, and I can well understand it. It is several years ago.

Would you mark this letter, please.

(A copy of a letter dated June 14, 1962, to The Honorable Theodore Levin from Milton J. Trumbauer, Jr. was marked Defendants' Exhibit 11 by the reporter.)

Q (By Mr. Friend) Now, I show you what has been marked as Defendants' Exhibit 11 and ask if you have ever seen that letter?

A I believe so, yes, sir—a copy of it.

THE COURT: What is it, in general?

Q (By Mr. Friend) What is it, yes?

A It is a letter addressed to Judge Levin, signed by Mr. Trumbauer.

THE COURT: All right.

Q (By Mr. Friend) Were copies sent to anybody?

A Copies were sent to you, to Bass & Friend, attorneys at law, in New York; to the Food and Drug Administration in Detroit; and to Mr. Goodrich, who is the Assistant General Counsel for the Department of Health, Education & Welfare; and it relates to the same pre-trial conference.

Q And the decision, I take it, was made, as appears [fol. 189] from this letter, that Interrogatory 16(b), 16(c), 27, 32, 34, 37, 44, 50 and 59 of the original interrogatories, and 14, 16, 19 and 20 of the additional interrogatories would be withdrawn?

A If it so states, yes, sir.

Q And that, however, the Government continued to oppose claimant's objections to interrogatories 18, 20, 21, 22, 23, 26, 30, 35, 52, 57 and 60; isn't that so?

A That sounds right, yes, sir. I don't remember. There are eleven of these interrogatories in this category you mentioned.

Q Now, Mr. Fowler, do you know what information was called for in interrogatories to which the Government was insisting that the defendants answer? And to help you on that—

MR. TRUMBAUER: Your Honor, I object because this is all in the record. Why does he have to question this witness as to whether he knows items that are in

the record? It seems to me this is just a complete waste of time.

THE COURT: I don't know. He may answer, but I don't know.

A Offhand, no, sir.

Q (By Mr. Friend) Isn't it true, Mr. Fowler, that the interrogatories which the Government was insisting that the defendants answer pertained to elements of proof in the very criminal case that we are here on today?

MR. TRUMBAUER: Objection, your Honor, on the grounds that the witness has said he doesn't know. It's [fol. 190] in the record, anyway.

THE COURT: Well, it's just a statement by counsel. I don't know whether this witness would know or not.

Do you know?

A No, your Honor, I don't specifically know what those interrogatories—I don't recall now what they referred to.

MR. FRIEND: Your Honor, the written interrogatories are a part of the official file, and I would ask your Honor to take notice of the information called for by the interrogatories to which the Government was not withdrawing its objections and insisting that defendants answer; and I at the conclusion of the hearing will point out to your Honor that they are the identical matters which are the subject of this criminal case, and the matters with respect to which they withdrew their objections were matters that they had already had the information on anyway.

I thought it would be proper to make the point through the witness, but if the witness doesn't know, we can make it as argument, your Honor.

Q (By Mr. Friend) Now, there came a time, did there not, when Mr. Randolph's office and Mr. Milstead's office recommended criminal prosecution to the Department of Justice?

A Yes, sir, there came a time.

Q Yesterday the evidence was submitted that that time was on June 13, 1962. Just the day before—

[fol. 191] THE COURT: Let's see, now, that was when?

MR. FRIEND: June 13, 1962.

Q (By Mr. Friend) At or about the same time that the letter of June 14th concerning the interrogatories was sent?

MR. TRUMBAUER: Your Honor, I think—

THE COURT: Well, now, let's be specific. Let's be specific about this.

MR. FRIEND: I will withdraw the question.

Q (By Mr. Friend) Yesterday we had testimony that the decision to make the recommendation to the Department of Justice for criminal prosecution was made on June 13, 1962.

THE COURT: I don't know. Was it? Is that stipulated?

MR. FRIEND: Is that correct?

THE COURT: Is that your recollection, Mr. Trumbauer, or Mr. Byerley?

MR. TRUMBAUER: Are you referring to the decision of the Food and Drug Administration to recommend the prosecution to the Justice Department?

THE COURT: Yes.

MR. FRIEND: Yes. That's what I thought Mr. Daughters had testified to.

MR. BYERLEY: Your Honor, Mr. Daughters testified to the date that the office of General Counsel sent the letter to the Department of Justice. This is a dif- [fol. 192] ferent date from the date that the Food and Drug Administration recommended to the office of General Counsel to send such a letter. So that I think we should be clear whether we are talking about General Counsel or Food and Drug.

MR. TRUMBAUER: Well, if I may state, I believe that it is in the record already that—

THE COURT: What is this June 13, 1962 date?

MR. TRUMBAUER: That June 13, 1962 is the date that the office of the General Counsel of the Department of Health, Education & Welfare, which represents the Food and Drug Administration, recommended to the Department of Justice in Washington the institution of criminal proceedings.

THE COURT: All right.

MR. TRUMBAUER: I believe we have established that, Mr. Friend.

MR. FRIEND: Well, that's what I understood yesterday. Mr. Byerley is raising something about an interoffice memo from the Food and Drug to its own General Counsel, and that's just confusing at this point.

MR. TRUMBAUER: Well, there was obviously such a memo, and we just wanted to make sure that we were talking about the same point.

MR. FRIEND: Well, since the reference was made, can we have the date when the Food and Drug Administration recommended to General Counsel within the Food [fol. 193] and Drug Adminisration that a criminal case be brought?

MR. TRUMBAUER: That will be established through Mr. Randolph, who has personal knowledge.

THE COURT: Why don't you wait for him, then, and you can get it.

Q (By Mr. Friend) Were you sent any information concerning the decision to refer this matter to Justice for criminal prosecution?

THE COURT: Did he what?

MR. FRIEND: Did he receive any information from the Food and Drug Administration.

THE COURT: All right.

A We ordinarily receive a copy of the letter that Mr. Goodrich, of the General Counsel's office, writes.

THE COURT: Mr. who?

A Mr. Goodrich in the General Counsel's office.

Q (By Mr. Friend) Do you have that letter?

A I believe so, yes, sir, or a copy.

Q May I have it, please?

MR. TRUMBAUER: Would the reporter read that question back?

THE COURT: Yes.

(The following question was read by the reporter:

"Were you sent any information concerning the [fol. 194] decision to refer this matter to Justice for criminal prosecution?")

MR. FRIEND: Then the witness answered, your Honor, that he gets a copy of the letter of referral to Justice, and I asked for a copy of the letter, and that is what the witness is looking for.

MR. BYERLEY: Rather than tear up the file, may I provide you with my file copy which has already been removed and which we have promised to make available? It is identical except it is a different copy.

MR. FRIEND: Well, if it is identical, I don't care which copy it is.

What is the problem, gentlemen?

MR. BYERLEY: We are not sure of which memorandum you want.

MR. TRUMBAUER: You want any information that he may have gotten relative to Mr. Randolph's recommendation to the General Counsel?

MR. FRIEND: No.

THE COURT: Let me ask. What is it specifically? Tell us again what you want.

MR. FRIEND: The witness said that the General Counsel's office sent a memorandum or a letter to the Justice Department recommending criminal prosecution. He said he got a copy of that letter. All I'm asking for is a copy of that letter.

[fol. 195] THE COURT: All right.

MR. BYERLEY: Be my guest. (Handing document to Mr. Friend.)

MR. FRIEND: Your Honor, this is rather lengthy. May I request, sir, a five-minute recess?

THE COURT: All right.

(A recess was taken.)

THE COURT: Proceed.

MR. FRIEND: Mr. Goodrich, the General Counsel, made the recommendation to the Department of Justice on June 13, 1962, to bring the criminal prosecution against the defendants.

Q (By Mr. Friend) During the recess, there was handed to me by counsel a letter—which I will ask the reporter to mark as No. 12.

(A letter dated August 31, 1961, to General Counsel's office from G. S. Goldhammer, was marked Defendants' Exhibit 12 by the reporter.)

Q (By Mr. Friend) —a copy of which was part of your files, Mr. Fowler, and ask you if it is not true that the recommendation to the General Counsel's office to file criminal prosecution did not in fact emanate from Mr. Randolph?

A Well, this letter is signed by Mr. G. S. Goldhammer.

Q Isn't it a fact that Mr. Goldhammer at that time replaced Mr. Milstead as the person in charge of the [fol. 196] division in which Mr. Randolph was employed?

A Mr. Goldhammer was in the same Division of Regulatory Management. I believe he was more or less an assistant to Mr. Milstead at that time.

MR. FRIEND: Well, your Honor, I do want to save time. Can we have a stipulation from Government counsel, because we did agree off the record before, that this letter was in fact dictated by and prepared by Mr. Randolph, although it was signed by Mr. Goldhammer, the superior, in accordance with normal procedure.

MR. TRUMBAUER: Yes, we will so stipulate.

THE COURT: All right.

MR. FRIEND: And, your Honor, from this letter which is Defendants' Exhibit 12, it appears that the decision by Mr. Randolph—at least the letter was dated August 31, 1961.

Is that correct, gentlemen?

MR. BYERLEY: Obviously.

MR. TRUMBAUER: That's what it says, Mr. Friend.

MR. FRIEND: I see. I though it was an error.

Q (By Mr. Friend) When did you get this letter?

A The copy?

Q Yes.

A Ordinarily, we get the copy within two or three days. I believe I can check and tell you.

[fol. 197] Q It's not important, Mr. Fowler. You got it—

A September 5, 1961.

Q At or about that time. In any event, the letter from General Counsel's office recommending the criminal prosecution did not go out until more than a year later or until almost a year later?

A I believe so, yes. June, 1962, I believe.

Q I asked you the question because I just wanted to make sure there was no error in the dates on this letter.

On September 24th, the defendants filed supplemental answers to the written interrogatories, wherein they answered the questions that the Government had refused to withdraw, and which thereafter Judge Levin directed them to answer.

A Yes.

MR. TRUMBAUER: Is that September 24, 1962, counsel?

MR. FRIEND: 1962, yes.

Q (By Mr. Friend) What did you do with the answers, the copy of the answers?

A Are these the supplemental answers which you are speaking of?

Q Yes, sir.

A I put it in the file.

Q Which file did you put it into?

A At that time my recollection is there was only one file, and I put it in the sample number file that referred to this whole investigation.

[fol. 198] Q And that was the same file which included the criminal case?

A All of the recommendations and all the files that we had on these numbers.

Q What did you do with that file that contained all of the answers to the interrogatories and the supplemental answers and all of the other papers in the civil case?

A Would you explain more? What do you mean, what did I do with it?

Q Did you keep that file in your office at all times right up to the present time?

A That file has been in our office except when the first hearing was transferred to New York. Then the file was sent to New York, whenever that date was.

Q No. I am referring to after September 1962, when you had the supplemental answers to the interrogatories as part of your file. Did you at any time transmit that file or any portion of the file or make it available for inspection by anybody after that time?

A Not that I recall, no, sir. My recollection, it's been in the Detroit district office since that time.

Q Now, did there come a time when you separated out the file so that the part that was the civil part was not included within the part that was the criminal part?

A Yes, sir.

Q When did you do that?

A I would guess about a year ago.

[fol. 199] Q That would be after the indictment was filed?

A I believe so, yes, sir.

Q Now, what parts did you put into the criminal part of the file that you had just separated? How did you know, if I may ask two questions in one, how did you know which papers were to go into the criminal case and which papers were to go into the civil case?

A Well, generally speaking, everything up through the consent decree I left in the civil case. Then starting with the summary and recommendation and from then on all of the—not the interrogatories; they would be in the civil file—but all of the other papers, such as the copy of the indictment, and so on, would have gone into the criminal file.

Q When you say that you made more than one file, you mean you had two or more jackets?

A Two or more jackets, yes, sir.

Q Do you have those with you now?

A Yes, sir.

Q Will you put apart the ones that are the jackets in the criminal case and the jackets that are the civil case?

(Witness complies.)

THE COURT: He has done it.

Q (By Mr. Friend) Now, you said that you separated them out about a year ago. That would be in 1964?

A To the best of my recollection, yes, sir.

[fol. 200] Q You mentioned a consent decree having been filed in the civil case. That was filed on November 29, 1962?

A Yes, sir.

Q You didn't separate, I take it, the files after the consent decree was filed and the case was closed on the district level?

A My recollection is that the file was separated after the entry of the consent decree.

Q Yes. Well, that's the point. You say it was done a year ago. That would have been about two years after the entry of the consent decree.

A About a year ago, which would have been after the entry of the consent decree.

Q Yes, but it was two years after the entry of the consent decree.

A Possibly so.

Q And between the time that the consent decree was entered and the time that you separated it out, an indictment was filed?

A Yes, sir.

Q So you waited to separate out the two files after the matter had been presented to the grand jury?

A I believe so, yes, sir.

Q As a matter of fact, Mr. Fowler, you were a witness before the grand jury, weren't you?

A Yes, sir.

Q Without seeking to inquire into what was said at the grand jury room, isn't it true that you took into the grand jury room all of the files that you had which [fol. 201] were still in one file?

A I believe I did, yes, sir.

Q And isn't it true that you used to assist you in your testimony with the grand jury almost all of the papers that were in that one file which had combined the civil and the criminal case?

A I reviewed the entire file before I went before the grand jury, yes, sir.

Q Well, I mean when you were in the grand jury, you used that file?

A As I recall, I didn't specifically read from the file during the course of the grand jury testimony.

Q I didn't say that. I said you used it.

A I had it with me and I used it in preparing for the grand jury, yes, sir.

Q Now, are you prepared to tell his Honor that when you testified before the grand jury, that you made no reference to any of the matters that had been the subject of the civil case?

A I don't recall. I don't recall that I specifically told the grand jury what had been seized or what hadn't been seized.

Q Well, did you—

MR. TRUMBAUER: Your Honor—

MR. FRIEND: I don't want to ask him what he said to the grand jury, your Honor.

MR. TRUMBAUER: I believe that the Court, in its discretion, can lift the veil of secrecy of the grand jury proceedings. That's my understanding of the law. I [fol. 202] merely make an objection for the record, so that the Court can consider it, whether we are getting into an area where the veil of secrecy is being lifted and whether the Court feels that in its discretion it will so lift it.

THE COURT: Well, there hasn't been any request to lift it. There has been some inquiry as to what went on there. I don't know how far they are going to go. If you have an objection to a specific question, I will be glad to consider it.

Q (By Mr. Friend) Mr. Fowler, so the record is complete on this point, when did you appear before the grand jury?

A My recollection is sometime in July 1963, wasn't it? Does the record show that? About the 17th of July 1963, to the best of my recollection.

MR. TRUMBAUER: We will stipulate that the grand jury records indicate that Mr. Fowler appeared in connection with this indictment on July 17, 1963, before a Federal grand jury.

Q (By Mr. Friend) Did you have any conversations with Mr. Randolph about your appearing before the grand jury?

A I may have advised him by telephone that I was to appear. I don't recall specifically.

Q Well, do you recall whether he said anything to you about the evidence that you were to produce or submit to the grand jury?

A My recollection is that no one gave me any instructions as to what I was to tell the grand jury.

[fol. 203] Q Now, you said, Mr. Fowler, that you used this single jacketed file which contained the civil and criminal data to prepare yourself for your testimony before the grand jury.

A Yes, sir, the file. Now, they may have been in two files at that time, but I don't think they were designated one way or the other.

Q All the papers were mixed in together?

A Yes, they were all mixed together. I couldn't find anything.

Q It wasn't because they weren't there; it was because you had a tough time disorganizing the file, rearranging it?

A Yes, sir.

Q Did you look at the interrogatories to assist you in the testimony you were going to give to the grand jury?

A I may have looked at them. I don't recall specifically.

Q Well, when you say you can't recall specifically looking at that, the truth of the matter is, is it not, that you looked and reviewed the entire file?

A They were available, and my recollection is I read the entire file before I went before the grand jury, yes, sir.

Q Including the answers to the interrogatories?

A I don't believe I had the answers to the interrogatories in the Detroit district file, the first answers that were filed.

Q How about the second answers?

A The supplemental ones, yes, I had those. After Judge Levin's hearing.

[fol. 204] Q Yes, the answers that were to the interrogatories which the Government refused to withdraw.

A Those were in the file after the answers were filed with the Clerk, yes, sir.

Q Now, were any of the records in your file or papers in your file submitted to the grand jury?

A No, sir, not to the best of my recollection.

Q The procedure, I take it—

A Other than the indictment itself, which I had a copy in my file. I don't know whether that was submitted to the grand jury or not.

Q I don't quite understand that. You mean you went in to testify before the grand jury armed with the indictment in your pocket?

A I think there was a copy of the indictment in the file.

Q Well, I thought, Mr. Fowler, that it is the function of the grand jury to determine whether there should be an indictment; it is not the function of the witness to bring an indictment in.

A A proposed indictment. Let me rephrase that.

Q Oh, I see. You went in to the grand jury room armed with a proposed indictment?

A If you want to put it that way, yes, sir.

Q Who gave you that indictment?

A That was forwarded with that letter from the Attorney General to Mr. Trumbauer.

Q Oh, I see.

[fol. 205] A When I got a copy of that letter, I also received a copy of the proposed indictment.

Q I see. When Mr. Goodrich or the General Counsel referred the matter to Washington for criminal prosecution, he submitted to Washington a proposed indictment and sent you a copy of the same proposed indictment?

A There is something the matter with the question.

MR. TRUMBAUER: We will stipulate to all of that, your Honor. I don't know what the purpose is.

THE COURT: You may proceed.

MR. FRIEND: Well, I think there is a purpose, Mr. Trumbauer.

MR. TRUMBAUER: Well, I will stipulate to it.

MR. FRIEND: That's what makes horse races. If I had known you would stipulate, I wouldn't be asking him the questions.

A To answer your question, when Detroit district received a copy of the letter of the General Counsel to the

Attorney General, my recollection is there was a copy of the proposed indictment attached to that copy of the letter.

Q (By Mr. Friend) Yes, that is correct. So that since June of 1962, there was as part of your files the proposed indictment which the Government wanted or sought to have or would attempt to have returned by the grand jury?

A Yes, sir.

[fol. 206] Q And you kept that proposed indictment in your files until you actually went in to testify before the grand jury almost a year later?

MR. TRUMBAUER: Objection. The question has been asked and answered.

THE COURT: It has been asked, I think, and answered at least twice. Now, let's not keep repeating the same thing over and over.

MR. FRIEND: Yes, sir.

Q (By Mr. Friend) Now, you knew, though, from the fact that you had had the proposed indictment, that certain matters in the proposed indictment pertained to lectures that Kordel had given and certain books that he had written and certain products such as Korleen and Frutex which had been sold?

A Yes, sir.

Q You also knew that the additional answers to the supplement, or the supplemental answers to the additional interrogatories requested information specifically with respect to the matters that I have just mentioned?

A I believe they did. I don't remember what those interrogatories were right offhand.

Q But you did remember and did know enough to keep within your file the supplemental answers to the interrogatories?

A Yes, sir. They were forwarded to me by Mr. Trumbauer.

Q And that was still part of your file when you went [fol. 207] into the grand jury, and in fact you used those interrogatories to assist you in preparing your testimony?

A Yes.

MR. TRUMBAUER: Objection, your Honor. The question has been asked and answered.

THE COURT: Well, it has been answered again.

MR. FRIEND: Your Honor, this I didn't think had been answered. He just said he read the answers in his preparation before the grand jury.

Q (By Mr. Friend) Now, did you reveal to the grand jury any information that was contained in the supplemental answers to the interrogatories?

A I don't recall.

MR. FRIEND: Well, if your Honor please, may I request that the veil of secrecy of the grand jury minutes be lifted, and that counsel be given an opportunity to inspect the grand jury minutes to determine whether in fact this indictment was procured by utilization of supplemental answers to interrogatories or answers to interrogatories which had been obtained over defendants' vigorous and bitter protests of two and a half years. I think that one of the issues your Honor has asked us to inquire into and ordered the hearing for is the good faith—

THE COURT: Is there any objection to that?

MR. TRUMBAUER: Well, if in the Court's discre- [fol. 208] tion it feels that it should do so, I have no objection.

THE COURT: I think that would be relevant.

MR. TRUMBAUER: All right. The only thing I might tell the Court is that the inspection of the grand jury minutes will reveal nothing because there was no court reporter in the grand jury.

THE COURT: I see.

MR. TRUMBAUER: The inspection of the grand jury minutes will reveal that Mr. Fowler appeared as a witness and that a true bill was returned. Those records are available in our office, and I will be glad to bring them.

THE COURT: What?

MR. TRUMBAUER: Those records of the grand jury minutes of the proceeding are available.

THE COURT: Well, bring the records in so we can see what they are.

MR. FRIEND: Your Honor, I understand from Jack Trumbauer that there are no minutes of the proceedings except a statement that they took place.

MR. TRUMBAUER: No court reporter was present.

THE COURT: Well, bring it in and see what the minutes are with respect to that. What he is saying, there was no court reporter.

MR. TRUMBAUER: Yes, that's what I'm saying. There was no court reporter.

[fol. 209] Q (By Mr. Friend) Were you the only witness who appeared before the grand jury, Mr. Fowler?

A In this matter?

Q Yes, sir.

A Yes, sir.

Q And the whole presentation, therefore, consisted of your testimony from your combined file of the civil and the criminal case?

A Yes, sir.

Q How long were you in the grand jury?

A I would guess half an hour.

THE COURT: Well, now, is this relevant? It seems to me this is going far afield as to how long he was before the grand jury—questions of that kind relating to this issue.

MR. FRIEND: Your Honor, the reason I asked the question, sir, is to show that when this witness had gone into the grand jury with this proposed indictment and the single file—

THE COURT: Go ahead.

MR. FRIEND: —he came out within a half an hour or in a half an hour with the indictment concerning the very same matters which were the subject of the civil case; and the point is that if the information in the civil case had not been utilized, I doubt very much whether—

[fol. 210] THE COURT: I say, go ahead.

Q (By Mr. Friend) Was there any representative of the Food and Drug Administration present in the grand jury room with you?

A No, sir; unless you would consider the Assistant United States Attorney.

Q No, no, I don't consider him.

A No, sir.

Q The Assistant was Mr. Finn at that time, wasn't he, who presented it to the grand jury?

A He handled it. Mr. Trumbauer was ill, as I recall it.

Q I see. Now, what did you do with the proposed indictment that you had carried into the grand jury room?

A I carried it in; I carried it out.

Q Was it exhibited to the grand jury?

A Not to my recollection.

Q Did the Assistant U. S. Attorney exhibit a copy of it to the grand jury?

A I believe he had a copy in his hand, or, rather, the original, possibly, I don't know.

Q Well, was the indictment returned in your presence?

A I don't believe so. I believe after the grand jury recessed, after the hearing I left, and later on contacted him to find out whether or not a true bill had been returned.

Q Well, did you contact him the same day?

A Possibly.

[fol. 211] Q Did he tell you that a true bill had been returned?

A Yes, when I contacted him, he told me that.

MR. FRIEND: I have no further questions, your Honor, subject to my examination of the grand jury mintues.

MR. BYERLEY: May we then just wait a few moments until Mr. Trumbauer comes back with the grand jury minutes?

THE COURT: Yes.

(Short interruption.)

MR. FRIEND: Your Honor, while we are waiting, if your Honor thinks it is relevant, to save time—I think it is relevant, sir—can we have a stipulation from counsel that the proposed indictment which Mr. Fowler carried into the grand jury was returned by the grand

jury in haec verba without a single change except a date was put on the bottom?

MR. BYERLEY: I cannot so stipulate without examining them, your Honor. I think that the indictment which is in the record will speak for itself.

THE COURT: Do you know or don't you know?

MR. BYERLEY: No, I do not.

THE COURT: All right.

MR. BYERLEY: I cannot so stipulate.

THE WITNESS: To my knowledge, it was filed without change.

THE COURT: Do you know?

A To my knowledge, it was filed without change, yes, sir.

[fol. 212] THE COURT: All right.

MR. FRIEND: That takes care of that.

Your Honor, may I proceed?

Q (By Mr. Friend) When you were before the grand jury, Mr. Fowler, you recognized that there was an element of interstate commerce to be proven in this case?

A Yes, sir.

Q You didn't call Freshman Vitamin, who manufactured the Korleen, and you didn't call Savoy Drug and Chemical representatives, who manufactured the Frutex, did you, to testify?

A No, sir.

Q Your testimony was you didn't call anybody?

THE COURT: What was the question?

Q (By Mr. Friend) Your testimony was, sir, as I remember, that nobody except yourself appeared before the grand jury?

A Yes, sir.

Q In actual fact, all you did was you took your big file which you had studied, and you gave the grand jury a resume of the pertinent information contained in that nice big file that you had studied the day before?

A Yes, sir, along the lines of the indictment, yes, sir, or the proposed indictment.

Q What do you mean, along the lines of the proposed indictment?

A Well, I gave them what information we had relating to these matters as it was set forth in the proposed indictment.

[fol. 213] Q Yes. Well, you didn't tell the grand jury what the source of that information was, did you?

A No, sir.

Q In other words, if it was in your file, regardless of what the source of the information was, you took the proposed indictment and you ground out the information that was in your file to fit whatever was in the proposed indictment?

A I supplied them with information available in our files which supported the proposed indictment, yes.

Q Yes, but you didn't tell the grand jury what the source of that information was?

A No, sir, not to my recollection.

Q If it was in your files—

THE COURT: Is this relevant to the point in issue here? I don't think it is.

MR. FRIEND: Your Honor, I thought it was, and that was the reason I was asking.

THE COURT: I am here to hear one precise issue, and I have been here going on two days now. I would like to have you confine your questions to the issue, and not fish for something else.

MR. FRIEND: Your Honor, I believe that this line of questioning does lead to something else, but I wasn't asking it for that purpose. I think it does go to the Government's good faith in the manner in which they [fol. 214] handled both of these cases and presented it to the grand jury.

THE COURT: It is difficult for me to see that your latter questions pertain to the issue.

MR. FRIEND: Well, the point as I see it, sir, is that they had a proposed indictment for over a year and waited until all the answers were given to the interrogatories and the consent decree in the civil case was over with, and then they made their presentment to the grand jury utilizing the very material which they had gotten in the civil case. Well, I think your Honor may draw an inference from that circumstance. If the indictment was

prepared and they were ready to go forth with that indictment, or at least try to get it, I say the fact—

THE COURT: There is a proper time for the arguments. Now, if you want to argue your matter, I will give you time later when you get through with the testimony.

Is there anything further?

MR. FRIEND: I would like to look at the grand jury minutes and then see if I have any further questions.

MR. TRUMBAUER: I will show them to the Court first.

THE COURT: All right.

MR. TRUMBAUER: This is the minute book of the March 1963 grand jury, which was convening in July; and if the Court will look about the middle of this page, here it is.

THE COURT: The United States Attorney is directing the attention of the Court to about the middle of the [fol. 215] page of a looseleaf notebook designated "Grand Jury," or with the heading on the page "Grand Jury for March 1963." It is part of a number of similar pages with the same heading. The first date in the book is 4-2-63; the last date on any page that I see here is 7-16-64; and the particular item to which the Court's attention has been directed by Mr. Trumbauer is dated 7-17-63.

And is there any objection to showing this to counsel so that he can see for himself, without me reading it, and then he can read it into the record if he wants to?

MR. TRUMBAUER: No, your Honor.

(The grand jury minutes were shown to Mr. Friend.)

MR. FRIEND: Your Honor, I would like to read into the record the fact that the looseleaf book which your Honor has described contains the following notation:

> "7-17-63 Lelord Kordel, George Fowler, Alfred Feldten, true bill"—actually, it's "T. bill,"

which I assume means true bill; and then the number 17 in parentheses which I believe refers to the date at which

it was returned. And then to the right it says the attorney is Finn, and it pertains to violation of Food, Drug, Cosmetic.

Your Honor, in view of the fact that there are no actual minutes, merely a notation of when the matter was presented and when the true bill was returned, I will have no further questions of this witness.

THE COURT: We will adjourn now until tomorrow [fol. 216] morning at nine-thirty.

MR. FRIEND: If your Honor please—I'm sorry it comes after the rap of the gavel—if I call for Mr. Milstead, can I have the cooperation of the Government in making him available?

THE COURT: Mr. Trumbauer says he will.

MR. TRUMBAUER: Yes, sir.

THE COURT: When do you want him?

MR. FRIEND: I would like him in the morning.

MR. TRUMBAUER: Is he on vacation or something?

MR. BYERLEY: Your Honor, I don't know Mr. Milstead's whereabouts—Dr. Milstead's whereabouts—but I think it has become apparent to the Court that Mr. Randolph could more clearly testify to everything that could Dr. Milstead, and I see no reason to pull him away from his duties in Washington.

THE COURT: Well, I don't know. Dr. Milstead's name has been brought into the matter at some length.

MR. TRUMBAUER: Could we do this, your Honor: is the Court planning on holding morning and afternoon sessions?

THE COURT: I don't know. I don't know how long this thing is going to run now.

MR. TRUMBAUER: Well, Mr. Randolph is certainly a necessary witness.

THE COURT: I don't know whether I should even have, even if he is available, whether I should have him here tomorrow, because I don't know how long you would [fol. 217] want with Mr. Fowler. You have another witness who is available here, Mr. —

MR. TRUMBAUER: Mr. Randolph.

THE COURT —Randolph.

MR. TRUMBAUER: And, of course, I am available.

THE COURT: Do you want to examine Mr. Randolph, Mr. Friend?

MR. FRIEND: Well, your Honor, I wanted to examine Mr. Milstead. He keeps referring to him as Dr. Milstead.

THE COURT: Mr. Randolph is here, and if you want to examine him, I will direct him to be here tomorrow.

Now, I'm not going to start getting a bunch of witnesses here from Washington on a weekend and make it necessary for them to go back home and come back again, or pay their expenses for staying over here perhaps when we can't use them.

Now, I want some cooperation here about these witnesses, and Mr. Randolph is here and you can use him as soon as this witness is through, and then I think I will decide when to have Dr. Milstead if you want him.

MR. TRUMBAUER: That would be very fine, your Honor.

THE COURT: Yes. I will not order him to be here tomorrow. I don't know how long you will be with—

MR. TRUMBAUER: Randolph.

[fol. 218] THE COURT: Yes.

MR. FRIEND: Your Honor, I certainly want to expedite it, and I will cooperate, of course, as I think I have. But I don't feel that any suggestion should be made by counsel that I have been not trying to cooperate. I am laboring under a handicap where I'm not getting complete cooperation, and I offer the—

THE COURT: Well, I have made my statement. I don't care to hear anything further about this from counsel. I have told you that I will make them have him available if he is.

MR. TRUMBAUER: We will know this afternoon.

THE COURT: You can call and tell him that he will be subject to being called in this matter, if he will hold himself available.

MR. TRUMBAUER: Yes, sir.

THE COURT: That's all I can do. But I am not going to order him to be here tomorrow and sit around all day and perhaps the weekend if we can't finish with the witnesses who are already here.

MR. FRIEND: Sir, I don't want him to be here wasting his time or money.

THE COURT: All right. That's all.

MR. FRIEND: Just to have him available if we need him.

[fol. 218a] (An adjournment was taken until 9:30 o'clock a.m. of the following day, Friday, August 6, 1965.)

[fol. 219]

Detroit, Michigan
Friday, August 6, 1965
10:05 o'clock A.M.

(The hearing was resumed pursuant to the adjournment.)

THE COURT: All right, proceed, gentlemen. The witness Fowler was on the stand.

GEORGE R. FOWLER, a witness called by the defendants, resumed the stand and testified further as follows:

CROSS-EXAMINATION

BY MR. TRUMBAUER:

Q As I understand from your direct testimony, Mr. Fowler, as well as the testimony of Mr. Daughters, that there were three notices of hearing issued during the year 1961 in connection with this overall case. Is that right?

A I believe so, yes, sir.

THE COURT: Mr. Fowler, you don't have to reach out and speak in the microphone. Actually, it doesn't

work quite as well if you do. Just ignore it and speak normally.

A Yes, your Honor.

[fol. 220] THE COURT: It creates kind of an echo.

Q (By Mr. Trumbauer) And the first notice of hearing was issued January 19, 1961; is that right?

A Yes, sir.

Q And I assume that all the notices of hearing have the same—it is a form which is filled in?

A The first page is a form, yes, sir.

Q And then the balance of it is—

A The balance is usually written by typewriter.

Q And that indicates the specific—

A Charges.

Q —charges or proposed charges?

A Yes.

Q Possible charges. O.K.

Now, can you explain to the Court just how it came about that there were three notices of hearing in this case? First of all, the January 19th notice of hearing. Now, that covered what basic evidence or charges?

A That covered only samples that were collected during the investigation conducted in Detroit during March and April 1960.

Q Then the next notice of hearing, as I understand, emanated from New York district. Is that right?

A Yes.

Q And that was on April 19, 1961; is that correct?

A I believe so. I haven't seen the notice of hearing. [fol. 221] That's my recollection.

Q Now, do you know from your records or general knowledge what that notice of hearing concerned itself with generally?

A It concerned itself with certain shipments of these products by Detroit Vital Foods from Detroit to New York City.

Q And when?

A I don't remember the exact dates. It was the first two or three months in 1960. I would say between January and April 1960.

Q But these were possible violations that the New York office had jurisdiction over; is that correct?

MR. FRIEND: Objection, your Honor. Whether it is a violation that the New York office had jurisdiction over, your Honor, is something we had discussed the other day. The shipments, the witness says, emanated from Detroit to New York. The jurisdiction would therefore have been in Detroit, not in New York, and he is asking the witness, therefore, a legal conclusion.

Q (By Mr. Trumbauer) In the administrative routine of the Food and Drug operation, were these possible violations something that the New York office had seen fit to take jurisdiction over?

A That's right. They have the records in New York and they handle the New York end of it.

Q Then we go to the notice of hearing that was issued out of Detroit on September 25, 1961; is that correct?

[fol. 222] A I believe that's the date, yes, sir.

Q Now, why did you have another notice of hearing issued in Detroit, since you had already had one notice of hearing issued in Detroit back on January 19th of 1961?

A During the spring of 1961, we conducted an additional investigation and collected additional samples in Detroit while Mr. Kordel was conducting a lecture here at that time. That was during the spring of 1961.

Q Oh, I see.

A April, as I recall. March or April.

Q Is it customary to issue new citations or notices of hearing under the statute 335 when possible separate crimes come to your attention even though it involves the same parties?

A Yes.

Q And in each case the person is given an opportunity to present his views with respect to those possible charges; is that right?

A That's right.

Q Now, in your direct examination by Mr. Friend, quite a few questions were asked of you as to your knowledge of the matter of the difficulty of proving interstate commerce in this case. Do you recall being asked several questions by Mr. Friend on that point?

A Yes, I do.

Q Now, can you tell me whether in the civil case, the original civil case, in a Food and Drug seizure the prov-
[fol. 223] ing of interstate commerce is an essential part of the case?

A Yes, it is.

Q You wouldn't have a civil case if you couldn't prove interstate commerce under the Food & Drug Act, would you?

MR. FRIEND: Objection, your Honor. He is asking this witness for conclusions of law.

THE COURT: No, I think he may answer. I think he knows enough about it.

MR. FRIEND: It is obvious, anyway.

A You couldn't sustain it, I don't believe.

Q (By Mr. Trumbauer) Now, can you explain or tell us what brought about the delay from May of 1960, when you say that you had the essential facts upon which you based your summary and recommendation of July 1961, can you tell us why it took that period of time from May of 1960 until July of 1961 for you to write to Washington with your recommendation for prosecution of the matters which were the subject of that first notice of hearing?

A Well, we do not institute a prosecution action, as an ordinary thing, without first issuing a notice of hearing. In matters of this kind, we do not issue notices of hearing unless so instructed to do so by the Food and Drug in Washington. And on this first hearing, you may recall the instructions were in December 1960. There was some delay in getting out the notice of hearing—about two weeks, as I recall—and then Mr. Friend or
[fol. 224] Mr. Bass, one or the other, asked that it be transferred, and I believe there was a postponement involved on the hearing date, which would account for the fact that it was July of '61 before this recommendation was submitted.

Q Now, I notice in your summary and recommendation, which is Exhibit 8—portions of it are Exhibit 8—that you state here that "we have full documentation including manufacturer's affidavit on the interstate in-

gredients used by Freshman Vitamin Co., Detroit, Michigan in manufacturing this item."

A Yes, sir.

THE COURT: That you had what, an affidavit?

MR. TRUMBAUER: Yes; that "we have full documentation including manufacturer's affidavit on the interstate ingredients used by Freshman Vitamin, Co., Detroit, Michigan in manufacturing this item."

A Korleen, yes.

Q (By Mr. Trumbauer) Korleen. That's the Korleen.

Now, you made this statement, didn't you, before any answers to interrogatories were ever received by any member of the Government?

A I believe so. At least I didn't have them in my file at that time.

Q Well, how did you feel about the interstate aspect of the case at the time that you submitted this recommendation?

MR. FRIEND: Objection.

[fol. 225] THE COURT: You mean July of '61?

MR. TRUMBAUER: July of '61.

MR. FRIEND: Objection, your Honor. The question was how did he feel about the interstate commerce question.

THE COURT: No, I think that that would be relevant. There is a question of good or bad faith here. He may answer.

A I felt that on all of the numbers on which I recommended prosecution in that summary and recommendation, we had adequate documentation and information to establish that those articles were shipped in interstate commerce or that the ingredients had moved in interstate —the active ingredients had moved in interstate commerce.

THE COURT: Well, when did you have the documentation to establish interstate commerce on that Freshman Korleen?

A At the time we instituted the seizure.

Q (By Mr. Trumbauer) At the time you instituted the seizure?

A Which would have been in June 1960.

MR. TRUMBAUER: I have no further questions.

THE COURT: Let me ask this: what drugs were involved in the civil suit?

A Korleen and Frutex.

THE COURT: Did you have documentation to cover Frutex when you filed the civil suit on the interstate commerce element?

[fol. 226] A Yes, sir.

THE COURT: Where was that shipped from and to?

A It was shipped from Savoy Drug and Chemical Company, Chicago, Illinois, to Detroit.

THE COURT: And the Korleen, you say, was shipped from—is that Ferndale?

A I believe it was Ferndale, Michigan at that time.

THE COURT: Ferndale is the Freshman Company?

A Freshman Vitamin Company, yes.

THE COURT: That was shipped from Ferndale to New York, is that it, the Korleen?

A No, sir. On the Korleen, your Honor, this was a civil action against the article on the basis that the active ingredients used by Freshman Vitamin Company in making the Korleen had been shipped in interstate commerce from several different sources.

THE COURT: I see.

Q (By Mr. Trumbauer) And you had an affidavit from Freshman Vitamin Company to that effect?

A I did, sir.

MR. TRUMBAUER: No further questions.

THE COURT: All right. Redirect?

[fol. 227] REDIRECT EXAMINATION

BY MR. FRIEND:

Q Mr. Fowler, if you had this affidavit from Mr. Freshman and another set of documentation from Savoy, was there any particular reason why the interrogatories included a request that the defendants admit the particular facts with respect to which you already had possession or knowledge?

MR. TRUMBAUER: I object to that question because this witness cannot answer it, your Honor.

THE COURT: Well, if he knows. If he knows, he may answer.

A I don't know for sure why the person who prepared the interrogatories considered it necessary to include that question. I couldn't state that with any certainty.

Q (By Mr. Friend) Is there any particular reason if you know, Mr. Fowler, why the person who prepared the interrogatories found it necessary to ask the defendants to admit the making of certain lectures in New York, the lectures in Detroit to which you have been referring, and to admit other allegations that are contained in the notice of hearings that you have been testifying about?

A I don't know the purpose for any of the interrogatories.

MR. TRUMBAUER: Objection, your Honor. Objection, because none of the interrogatories made any reference to any New York lectures, and Mr. Friend has in-
[fol. 228] cluded that as part of his question.

THE COURT: I see. Well, if that's the fact, I will sustain the objection for that reason.

MR. FRIEND: Your Honor, it is my recollection that the interrogatories refer to the Detroit lectures, and that the supplemental interrogatories refer to the New York lectures. If I am in error on that, sir, then I would amend the question to include only the Detroit lectures.

THE COURT: All right.

MR. TRUMBAUER: Same objection.

THE COURT: Well, objection overruled. He may answer it if he knows.

A I have no knowledge as to the reason for the preparation of any of the interrogatories. Usually it is to shorten a civil case. That's all I know.

Q (By Mr. Friend) Well, are you telling his Honor, Mr. Fowler, that so far as you are concerned, the Government can really try this criminal case on the evidence that it had on hand independently collected without utilizing the answers to the interrogatories?

MR. TRUMBAUER: Objection, your Honor. That calls for a conclusion on the part of this investigator—

THE COURT: Well, that may be.

MR. TRUMBAUER: —that should be asked of the United States Attorney, but not this witness.

[fol. 229] THE COURT: I think that's probably true. I would be interested to know that myself from the proper source.

MR. FRIEND: All right, sir.

THE COURT: I will sustain the objection as to this witness. I don't think this witness has anything to do with the actual conduct of the trial.

Q (By Mr. Friend) Well, Mr. Fowler, you are familiar with all of the evidence, material evidence, that was gathered together by the FDA in the New York office and the Detroit office and the Washington people concerning this criminal case, are you not?

A Yes.

Q Is it your testimony that this investigation and investigations in various parts of the country resulted in findings of facts that you believed constituted criminal violations of the Act?

A Yes.

Q And that none of the investigations and facts uncovered had anything to do with the interrogatories or the answers to the interrogatories so far as you are concerned?

A What I stated relative to the summary and recommendation that he had in hand was that, in my opinion, at the time I prepared the summary and recommendation, I had adequate documentation and information to show where we could get the witnesses to sustain interstate commerce on the items covered in that summary and recommendation.

[fol. 230] Q You recognized, as an experienced official with the FDA, though, that the actual trial of the criminal case might be facilitated if you could utilize admissions rather than utilize the testimony of the witnesses whose affidavits you had, did you not?

A It's possible.

Q So that while you might have had—

MR. TRUMBAUER: The witness hasn't answered that question yet, and again I object to the—

THE COURT: I thought he did answer it.

A I said it was possible.

THE COURT: He said it was possible.

A In other words, if you do not find it necessary to put on witnesses to establish interstate commerce, it will naturally shorten the case. I believe that was your question.

Q (By Mr. Friend) Not only interstate commerce, but any other element of the case.

A That's right.

Q And for that purpose, the Government might decide to use the answers to the interrogatories in lieu of actually calling the witnesses from whom you say you received affidavits and documentation?

A A decision as to what—

MR. TRUMBAUER: Your Honor, again I have to object to that question.

THE COURT: That question has been asked and [fol. 231] objected to and I sustained the objection. You have witnesses that you can ask that question of who have actual charge of the case.

Now, when I rule on an objection, let's not go over the same question again. It just takes time.

MR. FRIEND: All right, sir.

THE COURT: I would appreciate moving to something else.

Q (By Mr. Friend) Now, you suggested in response to Mr. Trumbauer's questions that the New York office had jurisdiction over the investigation of the second notice of hearing; is that correct?

A My recollection is that I stated they had the records, and the Administration told them to proceed.

Now, I believe that Detroit district could have handled that just as well.

Q Well, I didn't want to ask you whether the Detroit office could have handled it just as well. I want to ask you whether it is not a fact that the Detroit office did

handle a part of that investigation which had to do with the issuance of the second notice of hearing?

A My recollection is that the New York office issued the notice of hearing on the shipments made to New York.

Q I didn't ask you that, Mr. Fowler.

THE COURT: No. The question was whether you had something to do with the investigation leading up to it.

[fol. 232] A I don't remember that the Detroit office initiated that investigation or—

Q (By Mr. Friend) I didn't ask you that.

A —or participated in it to any degree.

THE COURT: That isn't the question, either. Listen to the question. The question is, did you have anything to do with the investigation of that matter, leading up to it. Now, listen to that and answer it, if you can.

A I don't think they did.

THE COURT: All right. Let's get an answer and go on.

Q (By Mr. Friend) Did you collect any samples of the shipments that were made from Detroit to New York?

A New York district inspectors collected the samples.

Q Did you interview Savoy or get any documentation from any of the manufacturers of that product located in Michigan concerning the shipments made from Detroit to New York?

A The shipment from Detroit to New York was an interstate shipment. Savoy was interviewed primarily relating to the samples that Detroit district inspectors had collected in Detroit.

Q How about the books that constituted or were alleged to constitute labeling for the shipments that were made to New York from Detroit?

THE COURT: Is that relevant to this issue?

MR. FRIEND: It is on the question of whether he [fol. 233] had anything to do with that investigation.

THE COURT: I know; but are any of these questions relevant to the point in issue here, the good faith issue—whether or not this office had something to do with

investigating the matter that could arise in connection with the New York hearing?

MR. FRIEND: Sir, I didn't think it did, but he raised the question to indicate that there was a matter pending in New York with respect to which Detroit had nothing to do with, and I want to show that they did have something to do with it.

THE COURT: Well, you brought it in originally, didn't you?

MR. FRIEND: No, sir.

THE COURT: The New York hearing? You developed all that on your direct examination.

MR. FRIEND: That there was a hearing that was held in New York on a transfer from Detroit.

THE COURT: You went into that a great length originally, and I think counsel was only trying to, I don't know, clear it up a little bit.

MR. FRIEND: All right.

THE COURT: It's hard for me to see it has much of anything to do with this point in issue here at all, unless you can get into something that relates to the good faith issue.

[fol. 234] Q (By Mr. Friend) Now, on this question of delay, Mr. Trumbauer asked you for an explanation as to why it took from May 1960 to July 1961 to make a recommendation for a criminal case. You said that there was a notice of hearing issued on January 19th which, at the request of Bass & Friend, had been transferred to the New York office.

A Yes, sir.

Q Well, when was the hearing actually held in the New York office?

A I don't remember the exact date. It was within six weeks.

Q It was March 8, 1961, wasn't it?

A Within about six weeks, I would judge.

Q And after March 8, 1961, the defendants filed a motion to stay the submission of answers to the interrogatories in the civil case; isn't that true?

A I believe so.

MR. TRUMBAUER: Your Honor, that's been covered several times, and I object to the question on that ground.

THE COURT: That's in the evidence. That has been gone over and over and over.

Q (By Mr. Friend) In any event, Mr. Fowler, you waited until after Judge Levin had rendered his decision before you made the recommendations; isn't that true?

A Do you remember the date of Judge Levin's decision?

Q Yes, sir; June 13, 1961.

A That is true.

[fol. 235] MR. FRIEND: No further questions.

THE COURT: Is there anything else from this witness?

MR. TRUMBAUER: No further questions, your Honor.

THE COURT: You may step down.

(The witness was excused.)

THE COURT: Call your next witness.

MR. FRIEND: Mr. Josh Randolph.

JOSH RANDOLPH was called as a witness by the defendants, and, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. FRIEND:

Q Mr. Randolph, will you state your full name and address, please?

A Josh Randolph, 8004 Riverside Drive, Bethesda, Maryland.

Q And what position do you hold with the Food and Drug Administration?

A I am a Food and Drug officer in the Division of Case Supervision of the Bureau of Regulatory Compliance.

Q Mr. Randolph, in 1960 were you associated with the

Division of Regulatory Management of the Bureau of Enforcement of the Food and Drug Administration?

A I was.

Q And in 1960, did you have anything to do with the [fol. 236] decision to recommend the issuance of a criminal notice of hearing under Section 335 concerning Korleen and Frutex and other products?

A I did.

Q Now, I show you Defendants' Exhibit 5, which is a letter dated December 29, 1960, from the Division of Regulatory Management, Bureau of Enforcement, to the Detroit district, signed by K. L. Milstead. Did you have anything to do with the preparation or investigation of the information contained in that exhibit?

A I wrote the letter which was signed by Dr. Milstead, who was my superior.

Q And in that letter, which is—

THE COURT: What is the letter, first of all, briefly. What does it cover?

A It is a letter from the Division of Regulatory Management of the Bureau of Enforcement of the Food and Drug Administration, dated December 29, 1960, directed to our Detroit district office, instructing them to issue a notice of hearing to Lelord Kordel and Detroit Vital Foods, Inc.

THE COURT: All right.

Q (By Mr. Friend) In addition to instructing them to issue a notice of hearing for violations of 502(f)(1) and 502(a) and 301(k) of the Act, your letter also pur-
[fol. 237] ports to set forth the respects in which each of the products was alleged to be misbranded and violative of the Act; isn't that correct?

A I believe that is true, yes.

Q As a matter of fact, it practically sets out verbatim the substance of the information to be set forth in the notice of hearing?

A That is correct.

Q Now, while this is dated December 29, 1960, Mr. Randolph, can you tell his Honor when you actually made the decision to recommend the District office to issue the citation of criminal violation?

A To answer that question fully, I would have to go back to April of the same year of 1960.

Q You mean, sir, in April of 1960, you were contemplating that a—

A No, sir.

Q Well, what do you mean when you say you have to go back to April 1960?

A Mr. Kordel was giving a series of lectures in Detroit beginning March 1960. The Detroit office were sending me daily reports of the substance of each one of the lectures. In addition to making a summary, they in due course sent me down a tape recording of the lectures. I listened to those lectures, and at that time the thought did enter my mind that sooner or later we would issue a notice of hearing.

Q Well, that's what I want to get at, Mr. Randolph. [fol. 238] The thought that you might recommend a criminal case or recommend the issuance of a notice of hearing, which is a prerequisite of a filing of criminal case—

THE COURT: Why don't we just call that a 335 hearing, and it saves about fifty words every time. Let's call that a 335 hearing.

Q (By Mr. Friend) In other words, the thought that you might issue a 335 notice entered your mind in April?

A If the facts warranted it.

Q At the time the facts, some of the facts, were being sent to you in April of 1960?

A I was reviewing the reports that were being sent in. They were being accumulated on a daily basis for a period of several weeks or a couple weeks.

Q When you say a couple of weeks, that would be during the month of April, I take it?

A That is correct.

Q And you were reviewing these reports for two purposes: (1) to determine whether you should issue a 335 notice; and (2) whether you should recommend that some other type of sanction; or both?

A I was reviewing the reports to try to make a judgment of whether or not, in my opinion, violations of the Food, Drug & Cosmetic Act were being committed by Mr. Kordel.

Q And if in your judgment they were, you were going to consider whether they should be redressed, these viola-
[fol. 239] tions should be redressed, civilly and/or criminally; is that correct?

A Not necessarily. It depended upon the completion of the investigation, and if the facts warranted it, I was going to issue a 335 notice of hearing.

Q In any event, Mr. Randolph, you already had it in your mind that there was a possibility that you would recommend the issuance of a 335 notice as well as perhaps recommend a seizure?

A Every investigation we make is a potential 335 situation and—

Q And you were cognizant of that in this particular case?

MR. TRUMBAUER: I would like the witness to be given an opportunity to answer the question.

Q (By Mr. Friend) I'm sorry, sir. I thought you were through.

A —and every investigation also is a potential seizure action.

Q Well, now, when did you actually make the decision to recommend a 335 notice?

A I didn't make that decision until shortly before the letter issued.

Q When you say shortly before, how shortly before, would you say?

A I received in, I believe, November 29, 1960, the answer to the libel of information. Until I received that, I divorced Lelord Kordel from my mind entirely after the seizure had been made, because I was involved in other similar investigations.

After the claimant's answers were filed, I started to prepare a proposed rough draft of the interrogatories.

Q Well, we will get to that, Mr. Randolph. Let me
[fol. 240] see if I understand it. You really didn't make your decision to recommend the issuance of a 335 notice until you examined the answer that Mr. Kordel had filed in the seizure action; is that what you are telling his Honor?

A No, I didn't say that at all.

Q Well, I thought you did. If you didn't say it, I would like the facts to be accurate.

A I said my decision, final decision, to issue a 335 notice occurred shortly before that letter issued.

Q Yes, sir.

A In the meantime, from about the first part of December of 1960 I was working on the interrogatories, proposed interrogatories. At that time I really dug into the case and analyzed all the facts and had a better knowledge of the overall picture after I had completed the proposed interrogatories.

After I had prepared the interrogatories and sent them out to our General Counsel's office, then is when I got ready and prepared the notice of hearing, the 335 notice.

Q I want to make sure that I understood what you said. You mean that the interrogatories or the first draft of the interrogatories were prepared by you rather than by the General Counsel of the Food and Drug Administration?

A Yes, sir; the proposed rough draft.

Q And was it you, Mr. Randolph, who made a proposed rough draft of interrogatories which asked the de- [fol. 241] fendants to make admissions? And I direct your attention to the actual written interrogatories.

A I had nothing to do with the preparation of the final written interrogatories.

Q I understand that. Did your first draft—

A I'm not sure whether my first draft asked that question or not, because it has been a number of years and I haven't seen them since I prepared them.

MR. TRUMBAUER: Your Honor, I have here what I believe the witness can identify possibly as that rough draft that is being—

THE COURT: You have it?

MR. TRUMBAUER: Yes, sir. Assuming the witness can identify it, I think he should identify it.

THE COURT: All right.

MR. FRIEND: Counsel has handed me what he says is the rough draft, and I would like to have it marked as Defendants' Exhibit 13.

(The rough draft of the interrogatories was marked Defendants' Exhibit 13 by the reporter.)

Q (By Mr. Friend) Mr. Randolph, I show you Defendants' Exhibit 13 and ask if this is the rough draft, together with the covering letter, that you prepared of interrogatories in the civil case?

A May I have the question read back, please?

(The question was read by the reporter.)

[fol. 242] A My name nor my initials nor any other markings of mine appear on these yellow pages, but this looks similar to what I did prepare and transmitted to—I did prepare the transmittal letter, and this is apparently what I sent over to General Counsel on December 21, 1960.

MR. FRIEND: I offer it in evidence, your Honor.

THE COURT: Any objection?

MR. TRUMBAUER: No objection.

THE COURT: Received.

Q (By Mr. Friend) Now, your name "Josh" does appear on the memorandum on the first sheet, does it not?

A That's not my writing.

Q That is your name, though?

A Yes.

Q And while the letter is signed by Milstead, in actuality, you informed his Honor that you prepared it?

A Yes. The copy of the letter under there bears my name as the dictator of the document.

Q I see. Now, this is marked "Rush." See that, Mr. Randolph?

A I do.

Q Is that your handwriting?

A No, sir.

Q Who had asked you to prepare these interrogatories?

A No one.

Q It is part of your duties, I take it?

[fol. 243] A Yes, sir.

THE COURT: Who prepared it, did you say? I didn't hear your answer.

A I prepared them.

THE COURT: You mean the draft of Exhibit 13?

A Yes, sir.

Q (By Mr. Friend) Now, there are some penciled notations on the draft striking out certain questions, certian information, and adding certain other information. Whose handwriting is that, if you know? Is it yours?

A It's not mine.

Q Now, for example—

A I think I do know, though.

Q Yes, if you know, would you tell his Honor.

A Mr. Francis McKay, an attorney in the General Counsel's office in Washington, D.C.

Q Now, the—

A No, I'm sorry. I would like to retract that statement. Let me see it again.

I don't think this is Mr. McKay's handwriting. It appears to be similar to the handwriting of Mr. Byerley.

Q Now, the statement in the interrogatories with respect to your request that the defendants admit certain information—and I am emphasizing the use of the word "admit"—was that in your first draft to begin with on all [fol. 244] the questions or most of the questions?

A This is my first draft.

Q Yes. And it was your idea, I take it, to put into the draft a request that defendants admit the facts in written interrogatories; is that correct?

A The word "admits" does appear in several interrogatories, yes.

Q Now, you transmitted this memo and the proposed interrogatories to the General Counsel's office—

MR. TRUMBAUER: Your Honor, may I interrupt before—

THE COURT: Wait a minute. Let me hear the question first. What is the question?

MR. TRUMBAUER: I wanted to go back, your Honor, to a point that has already been covered before this next point goes in, if I may. Just in the back of my mind this came to me.

You talked to Mr. Randolph here about having the defendants admit facts. You see, at that time there were no defendants. There was only a civil case, and I think that's an improper—

MR. FRIEND: Well, the corporation was in this case and is in that case.

THE COURT: Well, I think I know what was meant.

MR. TRUMBAUER: All right.

Q (By Mr. Friend) Since Mr. Trumbauer has raised [fol. 245] the question, an admission was requested of the corporate defendant in this case, I take it, to admit whether Lelord Kordel was president, to admit other names under which they operated, to set forth the names of the other officers-directors of the corporation, to admit the interstate shipment of the Korleen, to admit that the articles were misbranded, to admit that Mr. Kordel delivered lectures at various places and at various times, to admit what he said at the lectures, to admit that he had written books, to admit what the contents of the books were as interpreted by the Food and Drug Administration—in short, to admit each and every allegation which constitutes an element of the criminal case with respect to Korleen and Frutex; isn't that true?

A This interrogatory, proposed interrogatory, was prepared for one purpose and one purpose only.

Q I didn't ask you that. I asked whether my statement that the interrogatories requested admissions with respect to those matters was true?

A Assuredly. It's in here.

Q All right. Now this is dated December 21, 1960. Was this after the defendants had filed their answer in the civil case?

A I testified to that effect a few moments ago.

Q And you also testified, I understand, that after defendants filed their answer, it was then that you gave real serious thought to whether you would issue or rec- [fol. 246] ommend the issuance of a 335 citation?

A I testified that during the preparation of these interrogatories, which began about December 1, after I had received the copy of the answer, that I again began going through a voluminous file for preparation of interrogatories; and after I finished that, then I made the decision to issue a 335 notice of hearing.

Q Well, when you say after you finished that, Mr. Randolph, you don't mean that your thinking process

when you were preparing the interrogatories was completely separate from your thinking process as to whether you were going to issue a notice of hearing under 335?

A My thoughts concerning these interrogatories was for one purpose and one purpose only: To hasten the disposal of the civil action.

Q Well, isn't it true that at the very time that you were preparing these interrogatories, you, a non-lawyer—I take it you are not a lawyer, Mr. Randolph?

A You are correct.

Q While you were preparing a draft of interrogatories, you were at least contemplating that a 335 notice might be issued by you or recommended for issuance by you; isn't that true?

A Yes.

MR. FRIEND: I have no further questions, your Honor.

THE COURT: Is there anything further from this [fol. 247] witness?

CROSS-EXAMINATION

BY MR. TRUMBAUER:

Q Tell me, Mr. Randolph, is your experience in the Food and Drug Administration, does the issuance of a 335 notice of hearing constitute, as a matter of your actual experience, constitute a guarantee that the case is going to come to an indictment stage?

MR. FRIEND: Your Honor, I object to that question. It asks for a conclusion of the law. The notice of hearing speaks for itself as to what is contemplated by the notice of hearing.

THE COURT: I suppose that's true, although you have called upon this witness yourself, I think, to give some legal conclusions.

MR. FRIEND: Your Honor, I would stipulate that not every notice of hearing results in a criminal case.

MR. TRUMBAUER: All right. Thank you.

THE COURT: I think that the matter is pretty obvious to the Court without asking any questions.

MR. TRUMBAUER: All right.

THE COURT: I think you could ask the witness whether the mere fact that a 335 hearing is held, if it is a matter of policy to follow it with an indictment or not. [fol. 248] I think that would be something that I would like to know.

I will ask the question. When you give a 335 notice, is it a matter of the policy of your department to prosecute criminally, or just what is the purpose of the 335 hearing?

A The 335 hearing is to notify a proposed defendant that investigation by the Food and Drug Administration has disclosed that he is responsible for certain violations of the Federal Food, Drug & Cosmetic Act. In a year's time, probably we issue over a thousand—much over a thousand—during a year's time, of which much less than ten per cent ever reach a stage of either indictment or proceeding by information.

THE COURT: I see. All right. That's what I want to know.

Q (By Mr. Trumbauer) Now, tell me, Mr. Randolph, just what is your function in the Bureau of Case Supervision, which at that time was the bureau of Regulatory Management; is that right? ?

A Yes, sir.

Q Now, just what is your function in this bureau?

THE COURT: Wait a minute. What is the question? I don't hear you.

MR. TRUMBAUER: Just what is the function of the witness in the Bureau of Case Supervision, which at that time was the Bureau of Regulatory Management.

A My functions today are somewhat different from [fol. 249] what they were in 1960 and '61.

Q (By Mr. Trumbauer) Well, let's go back. That is the period that we are interested in, because that's the issue here.

A I was assigned to the Division of Regulatory Management. It was our responsibility to make investigations or to cause investigations to be conducted; to review the results of the investigation that had been conducted; and make a judgment of whether or not we thought that a violation of the Food and Drug Act had been committed.

Q Now, in that division and in that function, in the normal course of events on all of these cases, did the same man—for example, yourself—who was originally assigned to a case continue with that case through all of the various functions of it?

A Yes.

THE COURT: Both civil and criminal?

A Yes, sir.

Q (By Mr. Trumbauer) You were the man most familiar with the case when it started; right?

A That is correct.

Q And therefore, you continued with the case?

A That's correct.

Q Regardless of whether the eventual decision was to merely file a libel or to file an injunction or to file a criminal prosecution?

[fol. 250] A That is correct.

Q Now, what prompted your decision in this case to institute the civil action, to take that as step No. 1 in this proceeding?

A Before the Detroit district had recommended that Korleen and Frutex be seized, I had already received from them specimens of the exhibits that Mr. Kordel had handed out during the lectures. I had seen the bottles of Korleen and Frutex which he had sold during the intermissions at the lectures. I had listened to the hours and hours and hours of recordings of his lectures during this period, and it was my judgment that Mr. Kordel had misbranded, under the Food, Drug & Cosmetic Act, Korleen and Frutex; and when the Detroit district recommended their seizure and sent it down with supporting documents showing the interstate shipment of Frutex and the interstate source of the raw materials for the manufacture of Korleen, then I prepared a recommendation for seizure to our General Counsel.

THE COURT: Was that done before you received a recommendation from Detroit?

A I did not prepare the seizure recommendation to our General Counsel until after I had received the documents from Detroit supporting their recommendation for seizure.

THE COURT: When did you receive the recommendation from the Detroit office for seizure, do you know?

A I believe there is an exhibit that—I think I have a [fol. 251] notation here of my own.

THE COURT: Well, if you have it.

MR. TRUMBAUER: Exhibit No. 3 and 4.

THE COURT: 3 and 4?

A I believe it was about April 30, or somewhere in there.

THE COURT: That you received the recommendation from Detroit for seizure?

A Yes, sir. I don't have that particular date down, but I do have the date that I recommended seizure to our General Counsel's office, which is on May 20, 1960.

Q (By Mr. Trumbauer) But what prompted your decision to institute the civil action as step No. 1?

A To remove the article from the market to prevent continued distribution to the consumers of an article which, in my judgment, was seriously misbranded.

Q I see. Isn't this generally the reason for seizure actions as a whole, the matter of the public health and public—

A That is the sole purpose of seizure, yes, either from an economic standpoint or a public health standpoint or from a fraud standpoint.

Q And isn't it true that unless swift action is taken as far as a seizure is concerned, No. 1 there is a possibility that the public health might be damaged?

MR. FRIEND: Your Honor, I object. There wasn't any charge in the seizure of damage or danger to public health.

[fol. 252] THE COURT: Well, whether there was or wasn't, it's a question, and he may ask the question.

A Merchandise in interstate commerce is distributed very rapidly, and unless we do act as promptly as possible, there won't be any offending material left for seizure.

Q (By Mr. Trumbauer) Now, with regard to the rought draft of the interrogatories, you prepared a rough draft of proposed interrogatories which you sent over to the General Counsel's office; right?

A Yes, I did.

Q For their further work?

A That is correct.

Q And you asked the claimant Kordel or Detroit Vital Foods, whoever the claimant was, to make quite a few admissons, didn't you?

A I did.

Q Now, did these admissions refer and constitute, if proven, elements of the civil case which had already been instituted?

A Yes.

Q Is there any interrogatory here which does not refer to an element or an aspect of the civil case which had already been instituted by the Government?

MR. FRIEND: Your Honor, I am going to object to the question because the propriety of some of those interrogatories was the subject of a ruling by Judge Levin not [fol. 253] on our first motion, but on our second, and some of those interrogatories were stricken.

MR. TRUMBAUER: But he can give his opinion.

MR. FRIEND: He is asking the witness to tell us whether the interrogatories are proper or improper, something that lawyers have difficulty with every day in the week.

THE COURT: He may give his opinion. He has been asked here legal questions by both sides, and I am going to permit him to answer this if he thinks he knows, because we are trying to probe here into the state of mind of this man and others as to how and why they acted as they did. He may answer.

A Each interrogatory in here was for one sole purpose, and that was for the civil action.

THE COURT: Now, that's not the question. Now, listen to the question and just answer it. The question was, do those admissions that you requested there involve, in your opinion, all of the elements of the civil case? I think that's about it.

MR. TRUMBAUER: Or at least does each admission refer to some element or aspect of the civil case.

A Yes.

Q (By Mr. Trumbauer) And is that why you prepared them?

A Absolutely.

Q Tell me, is it unusual in your experience to prepare [fol. 254] interrogatories in connection with the civil seizure case where a claimant has answered and the matter is at issue?

A We do it every time provided there is sufficient time between the time we receive the copy of the answer and when it is set down for hearing. If there is time, we definitely prepare interrogatories every time.

THE COURT: Wait a minute. Read that question and answer, please.

(The last question and answer were read by the reporter.)

THE COURT: That's a matter of department policy, is it?

A Yes, sir.

THE COURT: All right.

Q (By Mr. Trumbauer) Why do you in the Bureau of Regulatory Management prepare the rough draft of the interrogatories when it is the job of General Counsel to finally file them or send them to the U. S. Attorney's office for review?

A We merely attempt to give our General Counsel the facts of the case and as to the type of violation so that they will be able to put them in final form.

Q Now, your recommendation to General Counsel for criminal prosecution, I think, is Exhibit No.—

THE COURT: It is Exhibit No. 12, isn't it?

MR. TRUMBAUER: Yes, you are right, your Honor, [fol. 255] Exhibit No. 12. Here it is.

Q (By Mr. Trumbauer) While this letter is signed by Mr. Goldhammer, you prepared it, right? That's the recommendation for criminal prosecution.

A Yes, sir.

THE COURT: What is the date of that?

A August 31, 1961.

Q (By Mr. Trumbauer) And when did you receive the first set of answers to the interrogatories that were answered by the claimant?

A The first set of interrogatories?

Q Yes, the answers.

A I would say between the 7th—around the 10th of September, '61.

THE COURT: When?

A About September 10, 1961.

MR. TRUMBAUER: I believe the records, your Honor, will show that the—

THE COURT: They were answered September 5th, weren't they?

MR. TRUMBAUER: The interrogatories were filed September 5th.

A They require several days before they filter down to my level.

Q (By Mr. Trumbauer) Let's continue on from the time that you made your first recommendation on August [fol. 256] 31, 1961, to General Counsel. Did anything further happen after that in connection with your recommendation to General Counsel?

A Yes.

Q What date was that?

A Sometime in the latter part of September or sometime in October, I prepared a memorandum and sent it to General Counsel, advising them that since I had transmitted our proposed recommendation for prosecution, that Mr. Kordel had returned to Detroit and delivered another set of lectures, and that we would like to include the second samples involved in the second Detroit lectures in the proposed indictment unless they had already referred this to the Department of Justice.

MR. TRUMBAUER: Will you mark this as Government's Exhibit No. 13, I think.

Wouldn't it be better to continue right through, your Honor, with the same set of numbers, rather than having two sets of numbers?

MR. FRIEND: The others are our numbers.

MR. TRUMBAUER: Well, some judges do it one way and—

THE COURT: Usually we mark them separately.

MR. TRUMBAUER: All right. We will mark this as Government's Exhibit No. 1.

(A carbon copy of a letter dated October 18, 1961, to General Counsel from G. S. Goldhammer was [fol. 257] marked Government Exhibit 1 by the reporter.)

Q (By Mr. Trumbauer) I show you what has been marked as Government's Exhibit No. 1 and ask you if you can identify it?

A Yes, I can.

Q Without going into the details of the letter, can you tell us who it is from and who it is to and what is the date of it?

A It is a memorandum dated October 18, 1961, from the Division of Regulatory Management of the Food and Drug Administration to our General Counsel's office, which was dictated by me the previous day, October 17th.

(A memorandum dated November 29, 1961, to General Counsel's office from G. S. Goldhammer was marked Government's Exhibit 2 by the reporter.)

Q (By Mr. Trumbauer) I have had the reporter mark another exhibit, Exhibit No. 2, and ask you to identify that, if you can?

THE COURT: Now, what was Government's Exhibit 1?

MR. TRUMBAUER: Let's go back to Exhibit No. 1 first. Exhibit No. 1, your Honor, is a letter dated October 18, 1961, from Mr. Randolph to the office of the General Counsel.

THE COURT: Is that dealing with the including of the subsequent matters in the criminal prosecution on account of the lectures given by Kordel in Detroit later?

A Yes, sir.

THE COURT: All right. Now, what is Exhibit 2?

MR. TRUMBAUER: That's Exhibit No. 1.

[fol. 258] Q (By Mr. Trumbauer) Then Exhibit No. 2, will you tell us what the date of that is and who it is from and who it is to?

THE COURT: Is it a letter?

MR. TRUMBAUER: A letter.

A November 29, 1961, from the Food and Drug Administration, written by myself to the General Counsel.

Q (By Mr. Trumbauer) And what does it say, if you can just summarize it.

A We refer to our August 31 recommendation for prosecution. Then we refer to our previous memorandum of October 18.

Q That's Exhibit No. 1?

A That one. I refer to a letter from Mr. Friend, and I suggested to the General Counsel that these sample numbers involved in the second series of lectures at Detroit be included in the proposed indictment for referral to the Department of Justice.

MR. TRUMBAUER: I see. I have no further questions.

REDIRECT EXAMINATION

BY MR. FRIEND:

Q Mr. Randolph, Mr. Trumbauer asked you if all of the items with respect to which you had requested admissions and other information in the interrogatories related to the civil case, and I believe you answered that it did.

A That's correct.

[fol. 259] Q Isn't it true also that all of those items and elements relating to Korleen and Frutex that were in the civil case are also part of the criminal case?

MR. TRUMBAUER: Objection, your Honor. That question has been asked and answered.

THE COURT: Yes, it has been asked. You have asked that once.

Q (By Mr. Friend) Mr. Randolph, did you already have the information in your possession or in the possession of other officers of the Department with respect to which you had requested the defendants to make admissions?

THE COURT: What was that question?

(The last question was read by the reporter.)

MR. TRUMBAUER: Objection on the ground that it has been asked and answered, I think, two or three times.

THE COURT: Well, I think it has. He may answer.

A If you could be specific, because there are a number of admissions in here, and I would request it in here if you would be specific, I think I could answer that question.

Q (By Mr. Friend) Well, you prepared the draft of the interrogatories.

A Yes, sir.

Q And you tell me and tell his Honor if there was any question that you had asked there with respect to which you didn't have the information, or whether you had the [fol. 260] information as to all of the questions?

A I had information on—

THE COURT: Can you answer that question? Did you request an admission as to any fact or matter that you did not already have evidence to support?

A No, sir.

THE COURT: I beg your pardon?

A We did not—I did not. I had documents to support every admission that I requested.

Q (By Mr. Friend) Do you know the purpose of interogatories? I know you are not a lawyer, Mr. Randolph, but having had as much experience as you have had, do you know what the purpose of interrogatories, as distinguished from requests for admissions under the Federal Rules of Civil Procedure, are?

A No, I don't.

Q Was there any information that you had requested not in the form of an admission, but information with respect to which you did not already have all of the facts?

THE COURT: Haven't you just got through asking that question?

MR. FRIEND: No, sir, your Honor. Some of those questions are not framed in terms of admissions. Some of them are framed in terms of requests for information.

THE COURT: All right.

A May I skim through and see if I can locate one?

[fol. 261] MR. FRIEND: Yes.

THE COURT: Aren't we really only concerned here with the admissions?

MR. FRIEND: I believe, your Honor, we are concerned with both.

THE COURT: Couldn't you obtain the other merely asking for information, couldn't that have been procured by subpoena duces tecum or otherwise from the corporation?

MR. FRIEND: Not necessarily, your Honor.

THE COURT: I thought we were dealing here only with the admissions. Didn't I cover that? Wasn't that all gone over in connection with your motion to suppress, and haven't I already ruled on that?

MR. FRIEND: Yes, your Honor has; but I believe there is—

THE COURT: What?

MR. FRIEND: Your Honor has and did refer to admissions in your meorandum, but I believe there are some questions there that were not—

THE COURT: Well, go ahead.

A There are some questions here that I asked that I did not have the answer for.

Q (By Mr. Friend) What was that?

A Here is one, No. 26 in my rough draft:

[fol. 262] "State the number of bottles of each Korleen and Frutex sold in the foyer of the auditorium during Lelord Kordel's lectures in Detroit, Michigan, during the period between March 29, and April 8, 1960."

I did not know the answer to that question when I asked them to state the number of bottles sold.

Q Is that one of the elements in the criminal case?

A The number of bottles? No.

Q Was it an element in the civil case?

A The number of bottles? No.

Q What did you ask it for?

A To find out how many people had actually been gypped.

Q Is that the reason?

A Yes, sir.

Q In your opinion gypped.

A In my opinion.

Q Are there any other questions that you asked that

really didn't have anything to do with the case except insofar as you were trying to satisfy your own pre-disposition?

A Yes, sir.

Q What other questions?

A The next question:

"State the number of copies of each book 'Eat and Grow Younger,' 'Eat Your Troubles Away' and 'How to make People Like You' that were sold in the foyer [fol. 263] of the auditorium during Lelord Kordel's lectures."

I did not know the answer to that question when I asked it.

Q Well, isn't it true that that has something to do with whether the books constitute labeling for the number of bottles that were available, and that that's an element in the criminal case as well as the civil case?

A No, sir.

Q Are you familiar with the Third Circuit decision in U. S. vs. Vitasafe?

A No, sir.

THE COURT: Now, here, just a moment. I would refer counsel to my decision on the motion to suppress, the last full paragraph on page 4, in which I said:

"Insofar as the answers to interrogatories in the civil case supplied information obtainable from corporate books and records which were subject to subpoena in any event in criminal proceedings, the use of such information cannot be said to be the result of an unreasonable search and seizure within the meaning of the Fourth Amendment, in view of the holding in *Essgee* that the Fourth Amendment does not protect the corporation from subpoena of its books and records in a criminal case. Whether the use of [fol. 264] admissions not obtainable from corporate books and records is barred by the Fourth Amendment is a more difficult question not resolved by that case."

Now, I want this proceeding kept within the bounds of my decision.

MR. FRIEND: All right, sir.

THE COURT: This is the third day now we have been on this phase of the matter.

Q (By Mr. Friend) Mr. Randolph, you testified that on August 31st, when you made the recommendation, 1961, when you made the recommendation to General Counsel, you had not yet received your answers to the interrogatories; is that correct?

A Yes, sir.

Q You knew on August 31st, did you not, that Judge Levin had directed the defendants to in fact provide the answers?

A I believe that I did know at that time that he was quired to supply the answers, but I also knew that irrespective of the answers, it would have no influence on my recommendation for prosecution.

Q When you made a recommendation for prosecution, you were talking about a recommendation on the earlier notice of hearing?

A That is correct.

Q Now, isn't it true that in August, before you made the recommendation, you had had something to do with the preparation of a motion to declare a default against [fol. 265] the defendants for failure to have answered the interrogatories?

A That is not my province, no.

Q Well, did you have anything to do with that? That's my question.

A No, sir.

Q Did you know about it?

A After documents of that nature are prepared by General Counsel, they supply us a copy for our information, and I did receive a copy.

Q Well, isn't it true that it was filed on August 4, 1961, or at least prepared—excuse me, prepared by General Counsel, with whom you were having so much correspondence, on August 4, 1961?

A I don't have any notes here that would refresh me.

Q Well, let me refresh your recollection by referring you to Defendants' Exhibit 9, which is a letter from Mr. Fowler to you on September 27th, referring to a telephone

conversation and the fact that in that conversation you had told Mr. Fowler about the motion which had been prepared by General Counsel on August 4, 1961.

A I knew that such a document had been prepared, yes.

Q And you knew that before you made the recommendation on August 31, 1961; isn't that true?

A August 4 does come before August 31st, yes.

Q Well, Mr. Randolph, I know that; but I want to [fol. 266] know when you knew about the August 4th filing, and the point is it was before August 31st that you actually had knowledge that a motion to compel responses to the interrogatories or suffer the penalty of a default was being prepared or had been prepared?

A I would say I knew about it between the 4th and the 10th, somewhere in there.

Q Fine. Now, on October 18th, Mr. Randolph, you wrote another memorandum to General Counsel, supplementing your August 31st memo which had recommended prosecution by indictment, and it is your suggestion, I take it, that the indictment include the additional counts which had arisen by reason of the second or third notices of hearing. Correct?

A That is correct.

Q Well, by that time you had the answers to the interrogatories, didn't you?

A That was what date?

Q October 18, 1961.

A I would think so, yes.

Q So that actually you made a recommendation for criminal prosecution for the first time with respect to crimes alleged in notices of hearings after you had received answers to the interrogatories, because as I understand it, the third notice of hearing pertained to crimes which were not part of the first or second notices of hearings; isn't that true?

[fol. 267] A The first letter to General Counsel recommending prosecution did not include the samples that were picked up during the second series of lectures in 1961.

Q What products were involved in those sample numbers? Wasn't there a Korleen or a Frutex involved?

A In the second one?
Q The one you are now referring to, the third one.
A I believe that might help me.

(Document handed to the witness by Mr. Friend.)

A I believe the subsequent memorandum would clear it up. Frutex and Korleen were purchased in 1961 and were recommended by me to be included in the indictment, yes.

Q Now, just so we have this clear, you recommended an indictment with respect to Korleen and Frutex on account of lectures delivered in 1961, after you had received the answers to the Government's interrogatories; correct?

A Yes.

Q Now, when you made that recommendation on November 29th, the third recommendation, wherein you included the whole package, there was a period of almost a year, was there not, before the recommendation was made by General Counsel to the Department of Justice?

A I made a—

THE COURT: A year after what?

Q (By Mr. Friend) A year after the November [fol. 268] 29th—approximately a year after November 29th—maybe it is eight or nine months—that General Counsel acted upon your recommendation.

A I have some dates here that General Counsel referred this matter to the Department of Justice on June 13, 1962, which is approximately seven months after I had referred it to them.

Q Were they waiting for the civil case to be concluded before they filed the indictment in the criminal case, if you know?

MR. TRUMBAUER: Objection, your Honor.

THE COURT: What's that?

MR. TRUMBAUER: I object to the question on the grounds that the witness is being asked what the General Counsel's office was doing or why they were waiting. This is not within his knowledge.

THE COURT: Well, if he knows. Do you know?

MR. FRIEND: I asked him if he knows.

A I do know.

Q (By Mr. Friend) Tell us if they were waiting for

the civil case to be concluded before they referred it to Justice.

A Mr. McKay, in General Counsel's office, is the gentleman who reviews and prepares the proposed indictments and informations. I had transmitted to him the records which Detroit district had sent to us.

Q Were those records records of the civil and criminal case which had been included in one jacket?

A They were the samples which were involved here, [fol. 269] and and consisted of the collection report, a copy of the invoice, a copy of the affidavits, a copy of freight bills, a copy of the labeling and labels.

After Mr. McKay had this for a while, he called me up. He said, "What can I do with this? I can't even read the labels." The district, instead of sending original copies of the labels, they sent us photostats or the methods of preparation by water, and it had run and you couldn't read the labels. And he asked me if I could please send him some labels that he could read so that he could identify the article in the indictment.

Then I prepared a memorandum to both New York district and Detroit district and asked them to please send some specimens of the original labels or readable copies of the originals so that Mr. McKay could proceed with the preparation of the indictment.

Q Did you mention to Mr. McKay that you would ask the defendants to make an admission as to whether labels and material which you had attached to the interrogatories were true and correct copies?

A Mr. McKay I did not, and Mr. McKay did not know anything about interrogatories.

Q Mr. McKay is the man who prepares indictments or informations, criminal informations, in FDA; is that correct?

A Not FDA; in General Counsel's office.

[fol. 270] Q In General Counsel's office of the FDA?

A That is correct.

Q Do you know whether he had the civil file with him or any papers from the civil file?

A I have known Mr. McKay for—

Q Well, just answer the question, Mr. Randolph.

A —I have never seen—I have been in his office dozens and dozens and hundreds of times, and I have never seen a civil file in his office after the libel had been transmitted to the U. S. Attorney.

Q But you weren't in his office on this occasion; you don't know whether he did or didn't?

A I was in his office to hand carry the labels over, and I certainly never saw the civil action in his office.

Q You didn't look for it, did you?

A No, I didn't make a search of his office, but—

THE COURT: Well, that's enough.

Q (By Mr. Friend) Were you the person alone who made the original decision to issue a 335 notice back in December of 1960, or did you confer with anybody about it?

A I'm sure I talked it over with my superiors and told them what I was going to do, and, "Here is the basis for issuing a 335 notice," and my recommendations were concurred in.

Q And was that by Mr. Milstead?

A I believe that Dr. Milstead did sign the letter.

[fol. 271] Q Well, I didn't ask you that. Did you confer with Mr. Milstead?

A I'm sure I did. Otherwise, he would not have signed the letter.

Q Was there anyone else you conferred with?

A It's possible, I'm sure, that I conferred with Mr. Goldhammer as well.

Q He was in the same department?

A Mr. Goldhammer was the Deputy Director of Regulatory Management.

Q Now, you said that the seizure was the first step in your attempts to handle the Korleen, Frutex and Kordel matter?

A That is the first regulatory action, yes.

Q When you take that first step, you do not treat this matter separately from Step No. 2, which might be a criminal case, do you?

A Yes.

Q In your own mind?

A I think we do, because—I know I do, because seizure is entirely separate from any 335 action.

Q Yes. But when you made the decision to remove the goods from commerce as contraband, to do that quickly, you hadn't put the file to bed at that point and said, "That is the end of the Kordel matter"; you were still contemplating whether further action would be taken in the form of criminal procedures; isn't that true?

A I believe I testified after the seizure was made I put the file to bed, so to speak, until the answer had been [fol. 272] filed, because I had a number of other rush jobs that I was working on.

Q And when the answer was filed, the matter was then reactivated in your own mind, and you began to give consideration to the interrogatories that you had drafted and whether further procedures under the Act in the form of a 335 citation would be justified?

A That's Step No. 3. Step No. 2 was after the files came back to my desk again, after the answer had been filed, to prepare the proposed interrogatories, which took considerable review. After that, a definite decision was made to issue a 335 notice.

THE COURT: This has been covered. I have heard it at least once, maybe twice, maybe three times.

MR. FRIEND: No further questions, your Honor.

MR. TRUMBAUER: I have no more questions.

THE COURT: All right. This witness may be excused.

(The witness was excused.)

THE COURT: We will take a short recess.

(A recess was taken.)

THE COURT: All right. Proceed, gentlemen.

MR. FRIEND: Your Honor, the defendants rest on this hearing. We have no further witnesses.

THE COURT: All right.

MR. TRUMBAUER: The Government will call Mr. [fol. 273] Walter Byerley to the stand.

WALTER E. BYERLEY was called as a witness on behalf of the Government, and, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. TRUMBAUER:

Q Your name, sir?
A Walter E. Byerley.
Q And your occupation?
A I am employed in the office of General Counsel of Department of Health, Education & Welfare, Washington, D.C.
Q And how long have been been so employed?
A A little over five years.
Q Roughly back in 1960?
A May of 1960.
Q And, Mr. Byerley, in May of 1960 and subsequently, did your duties include any relationship with the Federal Food and Drug Administration?
A Yes.
Q Will you explain that?
A The office of General Counsel in the Department of Health, Education & Welfare is divided into sections. I am specifically in the Food and Drug section. My duties are devoted entirely to enforcement of the Federal Food, Drug & Cosmetic Act.
[fol. 274] Q And was that true in 1960, when you first started with the office?
A Yes.
Q You are familiar, I believe, with both the civil and criminal prosecutions which have been the subject of this hearing in a general way; is that right?
A Yes, indeed.
Q And you are quite familiar with them. When did you first enter the picture as far as either of these actions are concerned?
A My first knowledge as far as either of these actions

is concerned would have been shortly after December 21, 1960.

Q And how did that come about?

A I was assigned the case of United States vs. A Certain Amount of Korleen and Frutex, to prepare written interrogatories in that case for filing.

Q I take it, then, that you did not prepare the original libel which was issued on or about June 10, 1960?

A I did not.

Q Or did you prepare any draft of it?

A No, sir.

Q You had nothing to do with the preparation of the original libel?

A No, sir. I never have anything to do with the preparation of libels.

Q Just to save time, that was handled by Mr. McKay?

[fol. 275] A That's correct.

Q Who is also in your office, but in a different section?

A That's correct.

Q You might just tell the Court how your General Counsel's office is divided up.

A The office of General Counsel is in two sections, the so-called pleading and the trial section.

The pleading section is responsible for the institution of cases, the preparation of the original complaints, information, libels, whatever the institution may require.

The trial section is solely concerned with the case after it has been instituted, claim and answer filed, and any motions, interrogatories, arguments from that point on are handled in the trial section.

Q Now, you got a rough draft of some proposed interrogatories, did you say?

A That's correct; sometime shortly after December 21, 1960.

Q And is that the draft that has already been introduced into evidence here as Defendants' Exhibit 13?

A Yes, sir, this is the draft.

Q At the time that you received this rough draft of proposed interrogatories, you had charge of the civil case in the General Counsel's office; is that right?

A Yes, sir.

[fol. 276] Q At that time, Mr. Byerley, when you received this rough draft of proposed interrogatories, were you contemplating in your own mind the institution of a criminal action against Mr. Kordel or anyone else that is connected with this case?

A No, sir.

Q Now, after you got this rough draft of interrogatories or proposed interrogatories, what did you do with them?

A I went over the rough draft and examined it for legal terminology and sufficiency, crossed out some of the questions, added others of my own, and in general drew up interrogatories which, as far as I could determine, were suitable for filing in the civil case.

Q And what did you do with those proposed written interrogatories?

A The ones which I drew up?

Q Yes.

A I submitted them to my superior for approval. They were approved, and I sent them to you.

MR. TRUMBAUER: Those interrogatories, I think the record will show, your Honor, were filed on or about January 6, 1961.

THE COURT: What's that?

MR. TRUMBAUER: Those interrogatories which Mr. Byerley is referring to, I think the record will show, the civil record—I'm sure counsel will stipulate—were originally filed on January 6, 1961.

[fol. 277] THE COURT: January 6 what year?

MR. TRUMBAUER: 1961. Those were the original—

THE COURT: All right. I think that is the date, according to the docket.

Q (By Mr. Trumbauer) And were there any further interrogatories prepared in connection with this case?

A Yes, there were.

Q And when were they filed?

A To the best of my recollection, they were mailed by me on April 10, 1961.

Q And were those additional written interrogatories handled in approximately the same way—that is, in their preparation?

A Yes.

Q You received a rough draft from Mr. Randolph, and then worked them up and then sent them out to me; is that right?

A That is correct.

Q At the time that you prepared the additional written interrogatories, were you contemplating and did you have under consideration a criminal case against the defendants who are the defendants in this action?

MR. FRIEND: Your Honor, I object to the question because the record shows that a 335 citation had already been issued in January 1961.

THE COURT: He may answer. Objection overruled.

A No, I was not.

[fol. 278] Q (By Mr. Trumbauer) Do you have anything to do with the filing of these 335 actions?

A I have nothing to do with it, and I don't even have any knowledge of it until a much later date.

Q Now, when was it, Mr. Byerley, that this matter of a possible criminal prosecution came to your attention?

A It would have been some time in the late spring or early summer of 1961, when Mr. Friend filed on behalf of the claimants a motion to quash the interrogatories on the basis that a 335 hearing had been held.

Q That was what date again?

A I am not sure of the precise date. I will have to check my files.

Q But I mean roughly?

A It was in the late spring or early summer of 1961.

MR. FRIEND: Your Honor, the motion was filed on April 10, 1961.

THE COURT: All right.

MR. TRUMBAUER: April 10.

A So it would have been at some time thereafter that I received knowledge of the 335 hearing.

Q (By Mr. Trumbauer) And when did you receive from the Food and Drug Administration a recommendation for prosecution?

A I did not personally receive a recommendation for prosecution. The office of General Counsel received it on [fol. 279] or about September 1, 1961.

Q And that was from Mr. Randolph, as I remember it?

A That is correct.

Q And then as I understand it from Mr. Randolph's testimony, he sent you a couple of additional letters, in one of which he asked you to hold off the proposed prosecution until certain other matters had been disposed of, namely, an additional 335 hearing; is that right?

A Mr. Randolph did send such letters to General Counsel shortly after the prosecution recommendation.

Q Would that be Exhibits 1 and 2?

A Yes.

Q And what was the next thing that happened after you received this indication from Food and Drug of a recommendation for criminal prosecution?

A After the recommendation came in to the Office of General Counsel, it was assigned a file number which was entirely different from the civil case file number, given an entirely new file jacket, and was sent in to Mr. McKay's office for preparation for filing and review to see if it was legally sufficient. During the period that it was being worked on, these other letters came in, so it was put into abeyance until sometime after November 29, 1961.

After that period of time—

Q Then the recommendation for criminal prosecution [fol. 280] wasn't referred to you?

A Oh, no. No, it was not.

Q Did you know that Mr. McKay was working on a proposed indictment?

A To the best of my recollection, no.

Q Now, where were the answers to the interrogatories, which was under your jurisdiction at that time, the civil case, where was the civil file at the time that this indictment was being prepared?

A It was in my office.

Q Did you, to the best of your knowledge, hand over your civil file to Mr. McKay for his review in connection with the preparation of the indictment?

A I did not. Not only not to the best of my knowledge; I recall that I did not.

Q Now, is that a routine procedure in your office, this procedure that you have indicated?

A It is. It is routine that once a case is beyond the initiation stages—

THE COURT: Beyond what?

A Beyond the stages of initiation—in other words, beyond the preparation of the original pleadings—the pleading section has no interest and no real knowledge of it except what may come about as a matter of casual conversation. The file is in the trial section. It is as-[fol. 281] signed to an attorney, who keeps the file in his office, and it does not go back to the pleading section.

Q So that after McKay prepared the original libel or proposed libel, that file went over to you?

A Well, it went over to me about December 21st or 22nd of 1960.

Q Can you tell me what the significance of November 29, 1961—

THE COURT: I have got an appointment to attend a meeting with some other judges. I guess I might just as well take a recess now until two o'clock.

(A recess was taken until two o'clock p.m. of the same day, Friday, August 6, 1965.)

[fol. 282]

Detroit, Michigan
Friday, August 6, 1965
2:00 o'clock P.M.

(The hearing was resumed pursuant to the recess.)

THE COURT: All right, proceed, gentlemen.

MR. TRUMBAUER: We would like to stipulate into the record, your Honor—we can mark it. Since we are moving along on Government's exhibits we will call it Government Exhibit No. 3 and have you mark it.

(A document entitled "Additional Interrogatories," and a covering letter dated February 3, 1961 to General Counsel from K. L. Milstead were marked Government's Exhibit 3 by the reporter.)

MR. FRIEND: Your Honor, we would be agreeable to stipulating the fact and the document itself, that on February 3, 1961, Mr. Josh Randolph prepared a draft of additional interrogatories with respect to Frutex and the lectures and other matters involved in the civil and criminal case, and that while the covering letter of his addressed to General Counsel is over the signature of K. L. Milstead, he in fact prepared the letter and the additional written interrogatory draft.

[fol. 283] THE COURT: Is that stipulated?

MR. TRUMBAUER: Yes, your Honor.

THE COURT: All right.

WALTER E. BYERLEY resumed the stand as a witness called on behalf of the Government, and, having been previously duly sworn, testified further as follows:

DIRECT EXAMINATION (Continued)

BY MR. TRUMBAUER:

Q Now, there was a second set of interrogatories filed in this case; is that right?

A In the civil seizure case, yes.

Q In the civil seizure case. And they were filed April 10, 1961?

A I believe that that is the date on which I mailed them to your office.

Q On or about April 10th that they were filed. Why was it necessary in this case to file additional interrogatories, or why did you feel that it was necessary to file additional interrogatories in this case?

A Shortly after we had served the original interrogatories, we moved to amend the libel to include further allegations of misbranding, and in order to extract cer-

tain information pertaining to these amendments, we filed additional interrogatories.

MR. TRUMBAUER: Your Honor, the civil record [fol. 284] shows, the Court's record in 20215, entry No. 14, the order of January 23, 1961, amending the libel in this case.

THE COURT: What was that date?

MR. TRUMBAUER: January 23, 1961, the amended libel or amendments to the libel were filed.

Q (By Mr. Trumbauer) Now, this exhibit No. 3, which counsel and I have stipulated to, appears to be some additional rough drafts of some proposed interrogatories from Mr. Randolph; right?

A That is correct.

Q And that was after the libel had been amended?

A That is correct.

Q And you then worked up some additional interrogatories and filed them or sent them to me for my review and for filing based upon the amendment to the libel?

A Yes.

Q Basically, Mr. Byerley, what was the reason why you prepared both sets of interrogatories in this civil proceeding?

A Interrogatories are prepared and were prepared in this case for three purposes: No. 1, to try to narrow the issues that we would face at trial by getting agreement, answers to interrogatories, or admissions which would establish certain facts that we would, of necessity, have to prove. If these are established by interrogatories, obviously proof is not necessary.

[fol. 285] If we can, of course, get enough information by way of interrogatories, this brings us to the second purpose: we are entitled to move for summary judgment based upon these answers.

And third, in order—

THE COURT: Wait a minute. I thought that was one reason you gave.

A No. I say the second reason is to enable us to move for summary judgment if we get sufficient information.

And thirdly, in order to demonstrate to the claimant, who many times may or may not realize the gist of the charges, we try to demonstrate to the claimant when he answers these interrogatories that he really does not have a case, and this may lead to a consent decree or a default decree on his part.

Q (By Mr. Trumbauer) Now, you have stated that you, in effect, represent the interests of the Food and Drug Administration in its dealings with other agencies and the public.

A That is correct; legally represent.

Q Legally represent them. And whose responsibility up to that point, up to the point of sending it to the U. S. Attorney in any given district, whose responsibility is it and was it to prepare the final draft of proposed interrogatories and to decide which interrogatories would be sent to the U. S. Attorney for his review?

[fol. 286] A Mine.

Q Or your counterpart in the General Counsel's office?

A Or whoever is handling the case in General Counsel. In this case, it was mine.

Q Was that true in 1960?

A It was true from about December 21st of 1960.

Q I mean as a general rule—

A Yes.

Q —wasn't it true and hasn't it been true ever since then?

A Yes.

Q Isn't this the routine procedure?

A Yes.

Q And in your experience, Mr. Byerley, how many times percentagewise, where there has been an answer to a libel, have you filed interrogatories in civil cases involving libels?

MR. FRIEND: Objection, your Honor.

THE COURT: Well, I don't know as it makes much difference. He may answer.

Q (By Mr. Trumbauer) A rough percentage.

A I would say between seventy-five and eighty percent.

Q Now, I think Mr. Randolph indicated that his final contact to the General Counsel's office, as represented by Exhibit 2, in which he indicated that the General Counsel should proceed or could now proceed, that was dated November 29, 1961. Do you recall that?

[fol. 287] A Yes, I recall that.

Q And Mr. McKay was then working on the indictment in your office during the period before the recommendation went to the Department of Justice; is that right?

A That is correct.

MR. TRUMBAUER: Mark this as Exhibit No. 4.

(A carbon copy of a proposed indictment and a covering letter dated June 13, 1962, were marked Government's Exhibit 4 by the reporter.)

Q (By Mr. Trumbauer) I will show you what has been marked as Government's Exhibit No. 4 and ask you if you can identify it, sir, as a part of the official records of the General Counsel's office?

A This is the file copy of the proposed indictment which was sent to the Department of Justice and the cover letter enclosing this proposed indictment to the Department of Justice by our General Counsel's office, dated June 13, 1962.

Q Did you have anything with the preparation of this letter?

A I did not.

MR. TRUMBAUER: I will offer this into evidence. I think you have already reviewed it.

MR. FRIEND: No objection.

MR. TRUMBAUER: Counsel indicates no objection.

THE COURT: Received.

MR. TRUMBAUER: I have no further questions.

[fol. 288] CROSS-EXAMINATION

BY MR. FRIEND:

Q Mr. Byerley, you said that Mr. McKay was working on the indictment and that the file in the civil case was still in your office. Can you offer any explanation to

his Honor as to how it turned out that the indictment which he prepared without your file in the civil case contains counts which are identical word for word verbatim with the charges that were in the libel of information?

A Yes I can.

Q What is the answer to that?

A They were both prepared by Mr. McKay.

THE COURT: I couldn't hear you.

A They were both prepared by Mr. McKay.

Q (By Mr. Friend) Well, did he remember the first libel of information and then a year later prepare an indictment which was identical or didn't he in fact have some of the papers in the civil case when he was preparing that indictment?

A I will answer your two questions one at a time. I don't know what he remembered and I do not know whether he had some papers in the civil case at the time he was preparing the indictment.

Q You were not the only gentleman that would have a copy of the papers in the civil case; isn't that true?

A Do you mean in the office of General Counsel?

[fol. 289] Q Your copy at the Food and Drug Administration was not the only copy that the Food and Drug Administration had?

A That is correct.

Q There were other persons who had copies of the papers?

A Of some papers.

Q So you don't know whether Mr. McKay had in fact had with him or utilized other papers from the civil case in the preparation of that indictment. All you know is that he didn't use your file?

A I know that he did not use some papers. There are other papers that he may have used.

Q As far as you know, he did not use your file?

A That is correct.

Q Mr. Byerley, referring to Government's Exhibit 4, which is the reference by your superior, Mr. Goodrich, to the Department of Justice recommending criminal prosecution, he referred to the seizure case, did he not?

A May I see it?

(Exhibit handed to the witness by Mr. Friend.)

A On page 6 I find that the letter informs the Department of Justice that a seizure case was instituted.

THE COURT: What is that again?

A On page 6 there is a statement that a seizure action was instituted and is now pending.

Q (By Mr. Friend) Doesn't it also tell the Attorney [fol. 289-A] General that five counts of the indictment or proposed indictment are the subject of the seizure action?

A May I see it?

(Exhibit handed to the witness by Mr. Friend.)

A Yes, it does.

Q Any particular reason that you know of why such reference was made if in fact the two files and the two proceedings were, at least in your mind, separate from one another?

A Yes, indeed.

Q What was that?

A I think that it would be quite important to the Attorney General and his subordinates and to the United States Attorney's office to know that there was a pending seizure action, in order to help them make a determination whether to forward the indictment for filing or to forward it without those five counts if they felt that there was any problem involved. I certainly would not try to keep the Department of Justice in the dark that we had two different cases going.

Q As a matter of fact, Mr. Byerley, in order for them to determine whether they should or should not actually file an indictment, you felt that it would be important for Justice to know about the seizure file, the civil file, so that they could review everything to see whether they had a case?

A No, Mr. Friend.

Q Well, why would you tell it to them, then? Were [fol. 289-B] you just giving them useless information?

A I repeat, I do not think that any attorney on any level, and particularly the Department of Justice, would want to try to make a decision to prosecute or to file an indictment without having all relevant facts at hand, and there is no doubt that the pendency of a civil seizure action is relevant if it involves the same facts.

Q Well, isn't it true, Mr. Byerley, that not only the mere fact that a seizure action is pending is relevant to the Department's determination as to whether they should bring a criminal case, but also what actual steps and papers have been filed in that civil case?

A I couldn't answer that.

Q Well, as a lawyer, wouldn't you say that's a reasonable conclusion that might be drawn?

A Not in a case such as this, where the Attorney General is not even given any reference to his own files or to the United States Attorney's files on the case. He is simply informed of the fact that this is a case that is pending that involved some of the same counts, some of the same people, and we think you should know about it in making your decision.

Q Well, other than the abstract fact that there was an action pending, what other aspects of that pending action would it be important for the Department of Justice to know about in making the decision?

[fol. 290] MR. TRUMBAUER: Well, your Honor, this witness is not a member of the Department of Justice.

THE COURT: I don't know whether he knows. If he doesn't, he can say so. If he does, he can answer.

A I'm not certain that I understood your question. Could I have it read back?

THE COURT: Yes.

(The last question was read by the reporter.)

A I have no idea.

Q (By Mr. Friend) Mr. Byerley, you work in a particular section of the General Counsel's office of the Food and Drug Administration. You told his Honor that the General Counsel's office is somewhat departmentalized so that you do not know everything that goes on with respect to all phases of either a case or a criminal investigation or a civil investigation concerning any particular company or individual; correct?

A No, I did not state that.

Q Wasn't that the substance of what you said: you work in one section, the trial section, and many times you don't know that either a civil or a criminal case is being contemplated or investigated until you first get the

libel of information or the indictment, as the case may be?

A Some of the things that you say are an accurate representation of my testimony; some are not. I can restate what I said.

Q Would you do that again, Mr. Byerley.

[fol. 291] A With regard to any particular case, until I receive the file upon having the case assigned to me, I probably will have no knowledge at all of any investigation, pendency, preparation, or anything else. Once the case is assigned to me and I receive the file, from that moment on I have intimate knowledge of everything that went on before and everything that went on thereafter.

So you have got to designate a point in time. Was it before or after I received the file when you say what did I know about a case?

Q Well, when you received the draft of the interrogatories from Mr. Josh Randolph, you didn't know that he was already turning over in his mind the possibility of a recommendation of a criminal citation under 335?

A No, I did not.

Q You then proceeded to treat these interrogatories as you treat every other set of interrogatories—whip them into shape, and relied pretty much on what he had outlined or suggested as the thrust of the questions to be asked; isn't that true?

A Not quite.

Q Well, you didn't change too many things there, did you?

A I did proceed to handle them routinely, as I did every other set of interrogatories, which is to go through his proposed rough draft, which incidentally I know from personal knowledge has been prepared from his past experience and also his using as a pattern some other set [fol. 292] of interrogatories previously sent out by General Counsel in another case that may be similar.

Q Well, you didn't know that at the time because you had just come to the Department; isn't that true?

A I had been there for eight months. I go over these interrogatories and try to determine what is the question that is being asked and why; and if the question

looks to me like it is a question that cannot lead us anywhere, I strike it. If there is not a question in there that I feel should be asked, I add it. If it is not phrased the way I think it should be phrased, I rephrase it.

In answer to your last question, yes, I did quite considerably change the final interrogatories that went out from the rough draft submitted by Mr. Randolph.

Q You left a lot of questions unchanged, though, didn't you?

A I left the gist of a lot of questions unchanged, yes.

Q Mr. Trumbauer asked you whether, in your judgment, everything that was in those interrogatories was relevant to proof of the civil case, and I believe you answered that it was or you wouldn't in your opinion, have included it.

A That's correct.

Q Well, isn't it true, Mr. Byerley, that under the Food and Drug law, the elements in a civil case except as to the burden of proof are identical as they are in a criminal case, and that if the question were relevant to your proof in a civil case, it would be relevant to your [fol. 293] proof in a criminal case?

A By and large, that is true.

Q You knew that at the time, that the law provided different sanctions for the identical offenses, one a criminal action and one a seizure action?

A Well, I don't want to promote my familiarity with the law too much, but after eight months, I think I knew it.

Q Well, I wouldn't be too modest if I were you, Mr. Byerley. I have had too many cases with you.

But so far as you were concerned, you proceeded to handle it routinely without, as you told his Honor, worrying about or thinking about its implications or use in a possible criminal case?

A That's correct.

Q But you can't tell his Honor what was going on Mr. Randolph's mind?

A No, I'm afraid I can't.

MR. FRIEND: No further questions.

MR. TRUMBAUER: I have no further questions. Thank you.

THE COURT: You may step down.

(The witness was excused.)

THE COURT: Does the Government have any further witnesses?

MR. BYERLEY: Call Mr. Trumbauer.

[fol. 294] MILTON J. TRUMBAUER was called as a witness on behalf of the Government, and, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BYERLEY:

Q Mr. Trumbauer, would you state your full name?

A Milton J. Trumbauer, Jr.

Q And your address?

A I live in St. Clair Shores, Michigan.

Q And your occupation?

A I am an attorney at law, and specifically I am an Assistant United States Attorney assigned to the Eastern District of Michigan as a trial attorney primarily.

Q How long have you been so employed.

A Approximately four years.

Q Since sometime in 1961?

A Since June of 1961, as I recall.

Q Mr. Trumbauer, are you familiar with the civil action of the United States vs. Korleen?

A Yes, I am.

Q Are you familiar with the criminal action of United States vs. Detroit Vital Foods and Alfred Feldten and Lelord Kordel?

A Yes, I am.

Q With respect to the civil action, when did you first learn of this case?

[fol. 295] A It was shortly after I came with the United States Attorney's office. I believe it was during the summer of 1961. The case was turned over to me

from the Assistant who was leaving—I think that was Mr. Moore—and so I reviewed that case along with many other cases that were assigned to me.

Q Did you continue to work with that case during the ensuing years?

A Yes, I have.

Q With respect to the criminal case, can you tell us when you first received notification from the Department of Justice that they were forwarding to you the recommendation to prosecute Detroit Vital Foods, Kordel and Feldten?

A That recommendation came to me on or about August 8th of 1962. At least as I remember, the letter from the Department of Justice from Mr. Shapiro's office, the Administrative Regulations Section, came to me about that time, the early part of August 1962.

(A letter dated August 8, 1962, to Mr. Lawrence Gubow from Harold Shapiro, with attachments, was marked Government's Exhibit 5 by the reporter.)

Q (By Mr. Byerley) I will show you what has been marked for identification as Government Exhibit 5 and ask if you can identify this?

A Yes, sir, I can.

Q And what is this?

[fol. 296] A This is the letter dated August 8, 1962, directed to Mr. Lawrence Gubow, United States Attorney, Detroit, from the Department of Justice, specifically Harold Shapiro, Chief of the Administrative Regulations Section, the subject of which letter was Detroit Vital Foods, Inc., Lelord Kordel, Alfred Feldten, and the Federal Food, Drug & Cosmetic Act.

The letter was accompanied by two enclosures, which I see are attached here to the letter, one of which is a copy of an item that is already in evidence, the letter from the Department of Health, Education & Welfare dated June 13, 1962 to the Attorney General; and also a copy of a proposed indictment directed to Mr. Gubow, as well as a copy of the various notices of hearing in the case.

This, although it was directed to Mr. Gubow, came to me because I had the case—that is, I had the civil case—

and apparently Mr. Gubow decided that since I had the civil case, I should proceed with the criminal case.

Mr. BYERLEY: I offer Government Exhibit 5 into evidence.

MR. FRIEND: No objection.

THE COURT: Received.

Q (By Mr. Byerley) Mr. Trumbauer, prior to the time that you received that letter, did you have any knowl-
[fol. 297] edge that the Department of Justice was going to recom-
mend prosecution of Detroit Vital Foods, Kordel and Feldten?

A No, sir, I did not. I had received no communication from the Department of Justice in connection with the matter. The only indication that I had that there might be a criminal proceeding in the wind was when we got into these various motions in the civil case, in which Mr. Friend made objections to the answering of interroga-
tories on the ground that, in his opinion, there was a possible criminal prosecution pending.

Q And this was in 1961?

A And this was from Mr. Friend, yes.

Q And this was in 1961?

A I believe that it was in 1961 when those motions were made.

Q Now, this letter came to you from the Department of Justice. Is every prosecution case under the Federal Food, Drug & Cosmetic Act forwarded to you through the Department of Justice?

A No. As a matter of fact, it is somewhat rare that we receive a case from the Department of Justice from the Administrative Regulations Section.

If I may explain that. There are only about just a very few situations in which, as a matter of policy, the matter is referred from the Health, Education & Welfare General Counsel's office to the Department of Justice. One of them is where a contemplated felony is involved; and since the allegations in this proposed indictment con-
[fol. 298] stitute, if proven, a felony, in view of the allegation in the indictment of a prior conviction of Mr. Kordel, as a matter of policy that type of case goes to Mr. Shapiro in the Administrative Regulations Section, and

then they review it, and if they decide to present it to the United States Attorney for his final decision, they do it.

Q You say "for his final decision." Can you in a case of this sort decide not to institute proceedings resulting in the return of an indictment?

THE COURT: Wait a minute. I didn't hear all of that. What is it?

Q (By Mr. Byerley) Can you in a case of this sort which has been referred to you from the Department of Justice with a recommendation that you present an indictment or present the facts in order to get an indictment, can you decline to ask the grand jury for an indictment on a case such as this, even though the Department had asked for it or recommended it?

A Oh, absolutely. As you might notice from the letter, the letter merely says that we concur in the recommendation of the Health, Education & Welfare; and it would be a rare case—rare indeed—where we are ordered to proceed with an indictment where we have decided to decline.

I don't say it's impossible. After all, we work for the Department of Justice and they are final superiors, and the chief of the criminal division of the Justice Depart-
[fol. 299] ment could, I believe, override the decision of the U. S. Attorney or any assistant. But in the vast majority of cases, that decision is left to the United States Attorney or his assistant and it was so left in this case.

Q In other words, you are saying up until the moment you present this to the grand jury, nobody other than yourself knows whether or not this case will be presented to the grand jury?

A That's correct, as a general matter. I might indicate to the investigative agency that I am planning to present it, because I will ask to have testimony taken at the grand jury hearing.

Q I believe the record in the criminal case reveals that the indictment was actually returned on July 17, 1963. You have testified that you received the recommendation under a cover letter dated August 8, 1962. Is there any reason why it took from August 8, 1962 until July 17, 1963 for further action on this recommendation?

A The only reason that I can give is that we have continually since I have been with the U. S. Attorney's office been, in my judgment, understaffed. I have a continual backlog of cases that I simply cannot get to in order to present them to the grand jury, and it is not unusual for me, particularly where a situation does not call for—like a bank robbery or something like that, where the man is a fugitive, that type of thing—it is not unusual in this type of case for several months to elapse, and that [fol. 300] is what happened here. I wanted to have an opportunity to look over the case, review it, review the proposed indictment, be satisfied in my own mind that it was a proper case to present to the grand jury, and so I just had to wait until I got some time to do that, and so frankly, the case sat in my file for several months. I finally got a letter from Mr. Shapiro several months later asking me about it, and I think about that time I started to go to work on it.

Q Now, I believe the record reflects that the interrogatories in this case were filed in early January of 1961 and in April of 1961. You were not employed in this office at that time, were you?

A That's correct.

Q Do you know the name of the Assistant U. S. Attorney who was handling the case prior to the time you took it?

A I believe there were two. I believe I took it over from Mr. Moore, who took it over from Mr. Donald Welday. As I recall, that's the sequence of Assistants. The record seems to indicate that Mr. Welday's name appeared on some of the earlier papers.

Q Now, was Mr. Moore the one who immediately preceded you?

A Yes.

Q Was he the one who actually filed the interrogatories?

A I couldn't be sure. It was either he or Mr. Welday. Frankly, I can't be positive.

Q Well, is Mr. Moore still employed in this office?

[fol. 301] A No. He left just a month or so after I came in June of 1961.

Q Is Mr. Welday still employed in this office?

A No. Mr. Welday had already left several months before I came.

Q And one of those two gentlemen actually filed the interrogatories in the civil case?

A That's correct.

Q And neither of them had any connection at all with the later criminal case?

A No connection at all with the later criminal case. They were both gone before any consideration of the United States Attorney's office was given to the institution of a criminal case.

Q And you, who handled the criminal case, were not even in this office when the interrogatories were filed in the civil case?

A That's right.

MR. BYERLEY: I have nothing further.

THE COURT: Cross-examine.

CROSS-EXAMINATION

BY MR. FRIEND:

Q Mr. Trumbauer, you say that your predecessors actually filed the original interrogatories. You mean by that, don't you, that they actually did the physical job of taking it to the Clerk's office for docketing? You do not mean to suggest that they prepared the interrogatories?

[fol. 302] A I don't know whether they prepared them or not because I wasn't here.

Q Well, you heard the testimony of Mr. Byerley, and from that testimony, I take it, you would agree that the interrogatories were actually prepared by the Food and Drug Administration?

A That, at least from the standpoint of my experience since I have been here, generally speaking—and this is not the only agency that I get help from; the same is true in income tax cases, specialized fraud cases. I get help from whatever source I can—

Q Don't misunderstand what I am getting at, Mr. Trumbauer.

A —and it is normal for us to receive proposed written interrogatories for our review, and sometimes I will make changes in them. I would say that many times I make only minor changes, but I do make generally at least some few changes. In some cases, no changes at all. It depends upon my estimation of the satisfactory condition of the interrogatories.

Q This may be in the record, but I would like to make sure and ask you the question. Isn't it true that the libel of information in the civil case, the indictment in the criminal case, the written interrogatories in the civil case, and the additional written interrogatories in the civil case were all in fact prepared by the Food and Drug Administration, and that no changes were made in them when they were actually docketed?

A Well, I don't know about the interrogatories because [fol. 303] I didn't prepare them.

As I remember, the indictment that came to me, proposed indictment, I don't think was changed by myself or any member of our office.

And I can't speak for the libel because I wasn't here.

MR. FRIEND: Would you mark this, please.

(A document entitled "Memorandum in Opposition to Claimant's Motion to Stay Further Proceedings or Extend Time to Answer Government's Interrogatories" was marked Defendants' Exhibit 14 by the reporter.)

Q (By Mr. Friend) Sir, I show you Defendants' Exhibit 14 and ask you if you can identify this document as having been prepared by your office or by the Food and Drug Administration?

MR. BYERLEY: Your Honor, I'm not quite sure I understand the gist of this question. Is he asking him to say if that was prepared by the Food and Drug Administration? If that is the question, I object, because he doesn't know, I'm sure, whether it was or was not.

THE COURT: Well, I don't know whether he knows or not. If he doesn't, he can say so.

MR. BYERLEY: Well, I don't know what the question was. It was a two-part question, and I am not that clear on it.

THE COURT: Well, no. He may answer.

[fol. 304] A Well, there is no date on this, so I am a little bit at a loss to—I remember this, and I think it will show that it was a memorandum in opposition to claimant's motion to stay further proceedings or extend time to answer government's interrogatories, and I believe that this came in while I was in office, though I can't state the date, and I believe that it came in from the Department of Health, Education & Welfare. As I say, I have received considerable help in preparation of briefs, and so forth, in these cases.

Q (By Mr. Friend) Mr. Trumbauer, don't misunderstand me. Far be it for me to suggest anything improper in getting help from the FDA. I just wanted to know whether this particular brief submitted to Judge Levin was prepared in Washington by the representatives of the Food and Drug Administration or by your office.

I believe, your Honor, the original of this is in the file.

A I would say if I knew the date of it, it would be a lot easier for me to answer.

THE COURT: If you don't know—do you know or don't you know?

A No.

Q (By Mr. Friend) Would you need the file to check it?

A Yes. If I had the file, I could check it.

MR. FRIEND: Your Honor, may I have the papers in [fol. 305] the civil file?

(The file was handed to Mr. Friend.)

THE COURT: Ordinarily, briefs are not filed in the official files. At least they are not in my court.

MR. FRIEND: There doesn't seem to be an entry in the docket of that particular brief.

THE COURT: It is probably in the Judge's file, if you are looking for the original brief.

MR. FRIEND: Sir, to save time can I have a stipulation from Mr. Byerley that that brief was in fact prepared in Washington? If he looks at it, I'm sure he would be able to identify it.

MR. BYERLEY: Do you have any date at all in connection with this?

MR. FRIEND: It was after our motion before Judge Levin, which was filed on April 10, 1961. Argument was heard on May 8, 1961, and this brief therefore must have been—

A Well, you see, I wasn't even with the U. S. Attorney's office. That's why I hesitated to answer that question.

MR. BYERLEY: I will stipulate, your Honor, that this is a copy of a brief that was prepared in the office of General Counsel, Food and Drug Administration.

THE COURT: All right.

MR. FRIEND: Is it stipulated in evidence?

[fol. 306] MR. BYERLEY: Let me put a date on that stipulation. It was sent out from our office on June 2, 1961.

MR. FRIEND: All right. Would you mark this as being received in evidence by stipulation.

MR. BYERLEY: I am not stipulating it into evidence.

THE COURT: What?

MR. BYERLEY: I am not stipulating it into evidence. I am stipulating that it is a copy of a brief prepared in our office.

MR. FRIEND: Well, your Honor, I don't want to take the time of recalling Mr. Byerley to identify it and have it offered that way. If we can get a stipulation, it would save a lot of time.

MR. BYERLEY: Your Honor, he has made no offer yet.

MR. FRIEND: I have. I said I would like a stipulation to have it received in evidence as Defendants' Exhibit 14.

MR. BYERLEY: I don't know why he is offering it, is what I am getting at. He has simply tried to get some identification. I will stipulate to the identity, but I don't know why he wants it in, so I will not stipulate it in at this time.

THE COURT: Well, do you object to it? That's the only question before me. It has been offered. Do you object?

[fol. 307] MR. BYERLEY: I cannot tell yet whether to object or not, your Honor. It depends upon the—

THE COURT: Well, there it is. He is offering it in evidence. Do you object or don't you? And if you do, what are your objections? It is just like any other exhibit.

MR. FRIEND: Your Honor, I have no further questions of Mr. Trumbauer.

MR. BYERLEY: I will not object.

THE COURT: Received.

MR. BYERLEY: I have no recross.

(The witness was excused.)

THE COURT: Does the Government have any other witnesses?

MR. TRUMBAUER: We have no further witnesses, your Honor.

THE COURT: Do the defendants have any rebuttal witnesses?

MR. FRIEND: No, sir, your Honor.

THE COURT: Well, how long do you gentlemen want to argue this matter?

MR. FRIEND: Does your Honor propose to hear argument today on it?

THE COURT: Oh, yes; right away.

MR. FRIEND: Well, I don't believe it would take me more than twenty minutes or so.

[fol. 308] THE COURT: All right. I will give each side twenty minutes to argue. I will take about a ten-minute recess.

(A recess was taken.)

THE COURT: All right, gentlemen. Proceed.

MR. FRIEND: May it please the Court.

THE COURT: Mr. Friend.

MR. FRIEND: May I start by telling your Honor what it is that we do not charge, so that we keep in focus what it is that we do contend and charge.

We do not charge Mr. Trumbauer, Mr. Gubow, the Deparement of Justice, or Mr. Shapiro of the Department of Justice, with any bad faith or any attempt to misuse civil processes of the court to obtain information for use in a criminal case. That is not what we contend, and that is not what we rely upon as the basis of our motion.

It is our position that, as a practical matter viewed in a very realistic sense, the prosecuting party in this case has been, from the very inception, the Food and Drug Administration and its various departments and divisions within that agency. The Bureau of Regulatory Management, of which Mr. Josh Randolph was the key figure, is the individual and the only individual who from the very outset had control and the decision-making function with [fol. 309] respect to seizure cases and with respect to criminal cases.

We say, your Honor, that the situation as it developed in this case is such as to require the most careful scrutiny of the Court, and I say that because it has been the routine procedure of this agency to follow in the past of taking a given set of circumstances, filing first a civil case, and then from the point of view of chronology, filing a criminal case, does not make it proper or legal. It was routine in the Escobedo situation for FBI agents to do certain things. It was routine in the famous case in the South with respect to which the Supreme Court rendered an opinion concerning right of counsel. But the fact that it was routine and followed as a normal course does not make it right and does not make it legal, and it does not necessarily mean that it is fair and just.

Here we have evidence, your Honor—I think this is the key point—that Mr. Josh Randolph, a non-lawyer, was the individual who actually prepared the first draft of written interrogatories which contained the requests for the admissions that your Honor is familiar with. At the very time that he was preparing those interrogatories, he admitted to your Honor both on direct examination and redirect examination that he was at least contemplating a criminal citation for the very same acts which gave rise to the seizure action.

The issue, your Honor, is not whether the final decision [fol. 310] had actually been made to bring the criminal

case. That is not the issue. The issue is whether, at the time he sought to extract—as Mr. Byerley so aptly put it —extract information from the defendants, he was contemplating a criminal case.

I say that is the issue, your Honor, because in the case of United States v. Thayer, 214 F.Supp. 929, we had a similar situation.

THE COURT: What case is that?

MR. FRIEND: United States v. Thayer, 214 F.Supp. 929, a 1963 case—

THE COURT: Now, just a minute. I can't write this down quite as fast as you—

MR. FRIEND: 214 F.Supp. 929.

THE COURT: Yes?

MR. FRIEND: In that case, your Honor, a prospective defendant or an individual was asked to testify before the Securities & Exchange Commission, and then he was indicted. He claimed that the evidence which he had given before the Securities & Exchange Commission, which is an administrative civil proceeding, should not be admissible.

In the criminal case that was filed it was admissible, your Honor—it was admitted, that is. A motion was made to vacate the judgments of conviction, and Judge Doyle, of the District Court in Colorado, in a very carefully rea- [fol. 311] soned opinion, sustained the defendant's contention for the following reasons:

He pointed out that from the record made before him, it was clear that there were at least indications that the SEC was at least thinking about, as he put it, if not considering a prosecution. It was unimportant to him and he rejected the Government's argument that the final decision to indict him had not been made until some time later.

The Judge pointed out that the fact of the matter is that at the very time that depositions and examinations were sought to be taken of this individual, the Government agency, the SEC, was at least considering contemplating the bringing of the action. He states, your Honor, that a perjury—they indicted him for perjury subsequently—a perjury indictment following an investigation where the defendant has been the subject of that civil or admin-

istrative proceeding requires the most careful judicial scrutiny. He says otherwise, the defendant or prospective defendant is on the three horns of a triceratops dilemma. At the time of the civil case he must give disclosure which is either harmful, he must either lie in his answers if he knows he is being investigated, or if he is, or he must confess to the crime.

If the defendants in the civil case in fact did give incriminating admissions, can it seriously be argued that the Government should now have the right, when they were [fol. 312] proceeding simultaneously with two cases, to use those admissions?

If it is true, your Honor, that they acted in good faith —and I say your Honor does not have to decide that question—I say that if it is true that they had this case put together separately and distinct from the civil case, if it is true that they didn't need the interrogatories, that they didn't rely upon them, then I say to your Honor the best evidence of their good faith is to come forward and prove their criminal case as though there had never been a civil case. I say to your Honor that's the best proof of good faith.

As far as whether they were contemplating the criminal action is concerned, Judge, Defendants' Exhibit 14, the brief that was put in evidence, though be it somewhat reluctantly on the part of Mr. Byerley, he wrote a brief which was submitted to Judge Levin wherein he said that prosecution is being considered. He said the person whose prosecution is being contemplated, namely, the defendants, they need not appear; they may present their views if they want to; but contemplation, they said, is not final decision.

But there can be no question, on the basis of their brief, on the basis of Josh Randolph's testimony, that the Government was at least contemplating seriously the filing of a criminal case.

THE COURT: That's pretty obvious from the filing [fol. 313] of the 335 notice, isn't it?

MR. FRIEND: That's the point. And when we made our motion originally, your Honor, we only could go on the fact that there was a sort of contiguity of time. The interrogatories came out a few days before.

The hearing has developed the one point which I consider crucial, your Honor—and I say this most respectfully —to our motion, and that is that the same gentleman who made the draft of those interrogatories, who sought to extract admissions, is the very same man who made the initial decision to file a 335 notice, a notice which under the statute appears to be a jurisdictional prerequisite.

Now, your Honor, may I direct your attention, sir, to another case which points up what I believe almost to demonstrate conclusively the bad faith of the Government. When I say Government, I mean the Food and Drug Administration, your Honor. I don't mean to have your Honor pass upon anything else but the FDA's role in this case.

United States v. Bridges, 86 F.Supp. 931, a case in California. We had a situation where the shoe was on the other foot. The Government filed a criminal indictment against defendants and simultaneously filed a civil denaturalization proceeding against Harry Bridges. They didn't file the civil one first; they did both of them at the same time.

You see, your Honor, the FDA—and this has been the [fol. 314] subject of much criticism by attorneys at the bar—file the civil case first as the routine practice, because they know that this is the way to get solid evidence or to make the trial of their case easier when they file an indictment.

The defendant Bridges in that case thought that it would be a good idea to ask the Government interrogatories, to take depositions of the Government. The Government came forward and makes the very same arguments that I made to your Honor as to why they shouldn't be allowed to do that, and the Government said, firstly, the court has discretion in matters of this type. They argued criminal cases take precedence over civil cases, but since both cases cannot be heard at the same time, the criminal case should be heard first, because otherwise the civil case could be used as an instrumentality for the defendant to obtain evidence from the Government which it couldn't obtain in the criminal case.

And, your Honor, the point is that those are the very reasons which Judge Harris in California said were founded upon substantial justice and fairness in the administration of the criminal law and would not allow the defendant to extract the information from the Government at that time.

The Government did the same thing in this case which they said they didn't have to do in the other case; and I say that while Judge Levin in fact required us to answer [fol. 315] the interrogatories, he did not pass upon whether —and I say this most respectfully, your Honor—I think that Judge Levin was in error, in view of the Bridges case and the other cases which we have cited. It was a matter of discretion. The Government should have fished or cut bait—try the civil case, bring it out, or try the criminal case; not both.

The court held in the Bridges case that as a matter of public policy, that a defendant or the prosecution in a civil case should not be required to give information as a matter of sound discretion which could be usable in the criminal case; and while Judge Levin required us to do that, your Honor, he did not rule that such evidence would be admissible or should be admissible, particularly the admissions. Your Honor has apparently indicated that if there was bad faith, that such evidence might not be admissible and would be suppressed.

Now, your Honor, in the very famous case of McNabb v. United States, 318 U.S. 332—that's Justice Frankfurter's landmark case—where an admission was extracted from a defendant by law enforcement officers, and while technically admissible under law, Justice Frankfurter said that it isn't really a matter of constitutional requirements in every situation; that it is the function of the courts to supervise the fair administration of criminal justice, and that zeal in tracking down crime is not in [fol. 316] itself an assurance of soberness of judgment. The court held that the court was not concerned with law enforcement practices as such, but only insofar as the courts are used as instruments of law enforcement.

Now, I say that in this case, your Honor, there is no question that the interrogatories had a place in the civil

case. There is also no question but that the same issues in the civil case found their way into the criminal case and were contemplated as being part of the criminal case from the very inception; and that if the court allows our admissions to be used, particularly where we objected vigorously and protested bitterly from the very outset so there is no question of a waiver, then I say your Honor has, in effect, allowed the courts to have been used by the Food and Drug Administration—

THE COURT: I am not dealing here now with the admissibility of evidence, am I?

MR. FRIEND: Well, if your Honor grants our motion to suppress, then the evidence would not be admissible —that is, the admissions.

THE COURT: I am not dealing here with an offer of evidence at this time.

MR. FRIEND: Well, your Honor is considering whether our admissions to the interrogatories should be utilized or received in evidence, or that any leads received from [fol. 317] those answers should be allowed in evidence. That was the motion we made to suppress.

While your Honor is correct, there is no actual offer of evidence at this time, I think that it would be helpful in the trial of the case to know that the Government cannot use the admissions that we made or any leads that were obtained from those admissions.

THE COURT: If they don't use any of these admissions, wouldn't the whole matter be moot?

MR. FRIEND: Absolutely.

THE COURT: There wouldn't be any merit to this motion to suppress.

MR. FRIEND: Precisely, Judge. And the fact that they insist in opposing my motion suggests to me that they do intend to use the admissions.

THE COURT: I don't know whether they do or not.

MR. FRIEND: Well, your Honor, I said this to these gentlemen before, and I say it in open court: that if the Government is acting—the Food and Drug Administration is acting in good faith, they need but represent to this court that they do not intend to use the admissions which we made in those interrogatories or any leads obtained

therefrom, and try this case as though there had never been a civil case, and your Honor is quite correct; the entire matter becomes moot, your Honor need not find good faith or bad faith on the part of the Food and Drug Ad-
[fol. 318] ministration.

But until your Honor has such a representation, then we would be faced with this, sir: At the trial, if they were to offer evidence of, take an example, interstate commerce, I would object on the ground that this was evidence obtained from the admissions, which should not be admitted. So I think the motion I made—and I made it for that reason—has the purpose and function of simplifying the actual trial so that we know in advance whether those admissions or leads can be used.

Now, your Honor, as far as Mr. Randolph's view is concerned, while he admitted that he was contemplating a criminal 335 notice of hearing at the time he prepared the draft of the interrogatories, he would have your Honor believe that he is of superhuman capacity that he could have dichotomized his brain at that time into two parts, one part that was directed to admissions that he was seeking to extract for the civil case, and the other part of his brain where he was just talking about the notice of hearing, which happens to be identical.

I think, your Honor, that his reference to the fact that the defendants were gyps, that he wanted to know how many people had been gypped, is a strong indication of the deep prejudice which this individual had against these defendants from the very beginning; or at the very least, your Honor, viewing it as objectively as I can, it certainly indicates pre-judgment on his part and a strong
[fol. 319] feeling that these people should be indicted. This is the gentleman that prepared the interrogatories. He isn't an attorney. The fact that it is done in the Food and Drug Administration as a routine matter, I repeat, your Honor, doesn't make it right.

Now, the first recommendation for criminal prosecution to the General Counsel was made by the same gentleman on August 31, 1961. It is true that he did not have the interrogatory answers at that time; but he knew, and he so testified, that Judge Levin had directed us to give those

answers; he knew that the Government had vigorously protested and opposed our request made before Judge Levin that we not be required to give the answers to the interrogatories; and indeed, Judge Levin, when we pre-tried the matter before him in 1962, expressed concern over why the Government had to ask eleven hundred questions on a matter that appeared to him to be as simple as it was.

Now, when he made his second recommendation on October 19th and his third one on November 29, 1961, true, they were necessitated by reason of the fact that a third notice of hearing had gone out; but when he made those recommendations, he already had the answers to the interrogatories.

In 1962, your Honor, when there were still outstanding additional questions that hadn't been answered, Mr. Randolph made a special call to Mr. Fowler, wherein he re- [fol. 320] minded Mr. Fowler—and I am referring to Defendants' Exhibit 9—to find out what's holding up, in substance, the answers to those interrogatories, and to find out whether counsel's motion to declare a default against defendants for failure to answer those additional interrogatories had in fact been filed.

As a matter of fact, I am wrong on the date, your Honor. This happened with respect to the first answers, not the second answers, but the point is the same. In other words, it was certainly important to him to know, while he was contemplating the filing of recommendations with the General Counsel on August 31st, in October, and November 29, 1961, what the status of those answers was.

I say to your Honor it is simply incredible—it is simply incredible—for one to accept a version of events that when he made his recommendation on August 31, 1961 that criminal prosecution be brought against these defendants, that he was doing so with a departmentalized brain which was not thinking about the fact that we hadn't answered our interrogatories.

I can't accept that, your Honor. I believe the inference is not justified from that set of circumstances, and the only reasonable inference is that he knew consciously that those answers to interrogatories had something—

THE COURT: You have already argued twenty minutes. I will give you five minutes more.

[fol. 321] MR. FRIEND: Thank you, sir.

The fact is, your Honor will recall, that Mr. Fowler testified that at the request of Mr. Josh Randolph, he went down to the U. S. Attorney's office and got copies of the answers and forwarded them.

Now, when did he do this, your Honor? He did it in the middle of September 1961, three weeks before the October 19th recommendation and seven weeks before the November recommendation.

Now, I say it is a fair inference, your Honor, that when he saw the answers to those interrogatories, he decided to expand the criminal recommendation which he had made to include the other matters with respect to Korleen and Frutex.

We can only deal in inferences, your Honor. This is a matter, in a sense, of intent. I don't expect any individual, the Government or otherwise, to get up on the stand and say, "I acted in bad faith." Your Honor has to, of course, in a case like this draw an inference from facts.

I remember Louis Nizer, your Honor, once saying in his book, "The truth is a strange thing. There is no absolute standard by which one measures truth. Truth can be measured only and is only what a reasonable person believes probably happened. It may never have happened at all."

But I say to your Honor what probably happened and what is a fair inference, and which is an inference which [fol. 322] I respectfully request, your Honor, be drawn in this case, which is a criminal case, is that the Food and Drug Administration, truly the prosecutor in this case, knew all along what they were doing, and it is high time, your Honor, that this particular agency were told that they should not and cannot use the processes of our courts to obtain information to put together or to make it easier to try a criminal case brought on the same violation. This is the only statute where that's allowed, where it's possible to do it. The statute doesn't suggest that it must be done.

Now, your Honor, the final point I want to make is with respect to the testimony of Mr. Fowler. Your Honor

heard testimony which, to my way of thinking, is absolutely shocking. Mr. Fowler had one file. Another important individual, a high official of the Government in charge of these two cases, had one file in which he had commingled the civil and the criminal papers to the extent that he couldn't separate them before he went into the grand jury. In fact, they weren't separated—

THE COURT: Do you contend that the Food and Drug Administration should hire one employee to investigate criminal matters and another to investigate civil matters, and never the twain shall meet?

MR. FRIEND: Your Honor, I don't contend that. I do not contend that.

[fol. 323] THE COURT: The Food and Drug laws carry both civil and criminal sanctions, do they not?

MR. FRIEND: Your Honor, they do; but I do not believe that it was ever contemplated by Congress that the Government should use both sanctions to whipsaw a defendant, to require a defendant or a prospective defendant, or one against whom criminal action is contemplated, to whipsaw him in such a manner that if he defends in a civil case, he gives admissions which can be used in a criminal case. I don't believe they ever intended that, and if I did, your Honor, I think if they did, I think the Constitution would override, or at least the holding in McNabb would override that kind of a concept.

Now, what did Mr. Fowler do? I think the use to which the answers was put is an indication of why they were obtained to begin with, and again we are dealing in inferences.

He reviewed the file—both files. He then had within his mind information which he obtained from both cases. He went into the grand jury armed with the very indictment which it was his responsibility to get.

I might add parenthetically that's some impartial, unprejudiced witness, if he is a witness at all—walks into the grand jury room armed with the indictment which his superior had prepared, and then proceeds, I take it, to make a speech or a statement or a report, whatever it is, [fol. 324] without knowing—and he himself admitted this—whether the information had been obtained from the in-

terroratories from the civil case, the criminal case, or just where it had come from.

Now, that is the subject, your Honor, of a separate motion, but on this motion it has to do and is relevant to the question of whether the Government should be allowed to use these admissions when everything indicates, to my way of thinking, sir, that from the very inception these interrogatories were directly tied in with the criminal case, and should therefore be suppressed. If they have a case, your Honor, let them prove it as though there never was a civil case.

THE COURT: Now, you have already used up your requested twenty minutes plus the additional five minutes that I allowed you.

MR. FRIEND: We lawyers always have a tendency to underestimate, but I thank you very much.

THE COURT: That may be, but it is getting late in the afternoon.

MR. TRUMBAUER: Your Honor, counsel, I am going to try to restrict my remarks, your Honor, to what I consider to be the essence of this hearing, and that is the Court's opinion that this hearing is to determine essentially whether the Government was acting in good faith when [fol. 325] it instituted the civil action; and, of course, the subsequent actions that would grow out of the civil action would, of course, be a part of that essential proposition.

The Court has already ruled in its opinion on the other aspects of the defendants' motion. So essentially, the Court is here to find out whether or not the Government acted in good faith in the institution of a civil proceeding.

We have had extensive testimony regarding the mechanics and machinery of the Food and Drug Administration, and essentially what we have learned is that Congress, having given the Food and Drug Administration a joint responsibility, a responsibility for the enforcement of both civil and criminal actions, or the investigation of those, quite naturally and quite normally in its normal proceedings sometimes has all three operations going at the same time: a civil case, followed by an injunction, and in some cases a criminal proceeding; and Mr. Friend, in essence, is saying this law is wrong and ought to be changed.

It is improper for the Food and Drug Administration to have the responsibility for the civil and criminal proceedings.

But I say to the Court that this is what Congress has seen fit to do, and the case law I think, your Honor, is quite clear that when we come to the issue of good faith, we start off at least with the presumption that the agency is acting in good faith.

[fol. 326] U.S. v. Ingersoll-Rand, 218 F.Supp. 530, at 542 said:

> "It must be assumed that public officials act in good faith."

In the case of In Re Coleman, 208 F.Supp. 199, the court said:

> "The Attorney General of the United States is the chief law enforcement officer of the nation, and he is presumed to be acting in good faith in the proper pursuit of his official duties, unless otherwise shown."

So if these men are out there doing what Congress has empowered them to do, it seems to me that before one could find evidence of lack of good faith, one would have to be confronted with true evidence of bad faith and evil motive, an intent to do wrong, an intent to subvert the statute; and I submit that all of the testimony we have heard here, starting off with George Daughters, who said, "Why, certainly we investigate the criminal and civil aspects of these cases. That's what we are supposed to do"; each one of these men has indicated that the basic reason for the institution of the civil case first is because of the necessity, because these interstate goods normally move swiftly, of getting hold of the res before the res is gone, and in many cases it's a matter of the public health, as [fol. 327] the Court knows—getting some product removed from the market—or the public policy of getting the matter removed in the event of either an actual deterioration of the goods or some sort of misbranding, no matter what that misbranding might be.

So essentially that's what we have here. We have a situation where the Food and Drug Administration doesn't just jump in and say, "We are going to prosecute this fellow." They take a step which is a normal step, a

proper step. They make the seizure, and then they review the case. They proceed with what is the most routine matter in the world, the filing of civil interrogatories; and I think that's been clearly established from all the testimony and, of course, your Honor can practically take judicial notice of that.

So we have a situation where in the normal routine of things—and I agree with counsel; just because it's routine doesn't make it right—but the fact that they acted in a routine manner, unless you are going to, as Mr. Friend would like to have you do, indict and condemn practically every criminal action that the Food and Drug brings, because many of them are preceded by civil actions, unless you are going to say that the whole operation of the Food and Drug Administration is a matter of bad faith, then there certainly was evidence here, definite evidence, that this matter was carried out pretty much like every other [fol. 328] case that ends up in a criminal prosecution. You had the filing of the civil suit; you had the bringing of the 335 action; you had the eventual, after further consideration, turning over to the General Counsel's office for their consideration of the matter; you finally had the reference to the United States Attorney's office; and the U.S. Attorney's office and myself were not even aware of the fact that the matter was prepared for a proposed indictment until I got that letter from Shapiro.

So we have a situation here where these defendants were treated in a proper way. They were given three notices of hearing under that statute, three opportunities to come in. Not just one, but every time some new evidence came to the attention of the Food and Drug Administration, they went to that statute and looked at it and said, "Well, here is another possible criminal action. We will have another notice of hearing."

The defendants had all the opportunity in the world to be appraised of the fact that maybe there was going to be a criminal action, and in the meantime they were proceeding with the civil case, which they had every right to do. None of the interrogatories that were filed in this case were other than interrogatories which were designed

to prove facts or to get admissions on facts which were an essential part of the civil case.

Now, the Government isn't required, I submit, [fol. 329] your Honor, as pointed out in the Abel case, to close its eyes or to, as the court said in the Abel case—and, by the way, in my opinion, the facts of the Abel case were far more susceptible to suspicion, you might say, than in this case. At page 229, the court says—228—bottom of 228 and top of 229:

> "Only the I.N.S. is authorized to initiate deportation proceedings. . ."

Well, in our case only the Food and Drug Administration is authorized to institute civil proceedings.

To proceed with the court's opinion:

> ". . . certainly the FBI is not to be required to remain mute regarding one they have reason to believe to be a deportable alien . . . and the FBI entertains the hope that criminal proceedings may eventually be brought against him."

Further down on that page, the court says:

> "The FBI was not barred from continuing its investigation in the hope that it might result in a prosecution for espionage because the I.N.S., in the discharge of its duties, had embarked upon an independent decision to initiate proceedings for deportation."

Obviously it is not exactly the same case, because [fol. 330] here you have two different agencies, and here you have one agency.

But in this situation you have an agency which is charged with the responsibility, and quite obviously, as Mr. Randolph admitted and as Mr. Daughters admitted, the possibility of criminal prosecution is considered very early in the game, because many of the same facts that are in the civil case could be used, and we admit that. It's so obvious. And certainly, after Mr. Randolph was frank enough to admit, that very early in the game he looked at this case and the possibility of a criminal prosecution 335 hearing came to his mind.

So he was honest and forthright with the Court that this came to his mind. And I might point out to the Court, since Mr. Friend has seen fit to refer to one remark that was made by Mr. Randolph, that evidence—I will have the citation in a minute, your Honor—but evidence of fraud is even admissible in a civil libel proceeding. I cite for that proposition the case of Research Laboratories v. United States, 167 F.2d 410. That was a Title 21, Section 352(a) proceeding, a libel, and the court said at 420:

> "This does not mean, however, that under the present law the appellee, in presenting to the jury a fair and complete picture of the claimant's activities, must [fol. 331] sedulously avoid adducing any evidence of fraud."

And it goes on to point out that it was proper to consider the labeling representation in the light of the setting in which the manufacturer intended the user to read them.

So Mr. Randolph's comment that he wanted to find out about the number of bottles that were actually sold would actually have been—that evidence could have been obtained. It was never included in the final interrogatories, but that evidence would have been admissible even in the civil case.

Mr. Friend has cited several cases to the Court, all of which he cited in his original brief—U.S. v. Thayer, U.S. v. Bridges, and the McNabb case, which, of course, involved a forced confession and is competely inapplicable.

We answered and pointed out to the Court in our reply brief that Thayer, for example, is inapplicable to this case. In that case the court didn't rule that evidence obtained at a prior administrative hearing was inadmissible in a later trial for criminal intent. The court said:

> "In the case at bar it can not be found and concluded that the testimony which formed the basis for the present indictment was illegally obtained and that it is, therefore, inadmissible. . ."

The Court reversed the case and sent it back for further hearings on the question of admissibility, indicating that the testimony was not per se inadmissible, but [fol. 332] that the circumstances surrounding the taking of the testimony controlled.

And we have a situation again, your Honor, here where you have, as I say, the same agency delegated by Congress to proceed with both the civil and criminal case, and I submit that unless you broke the FDA down and had a duplicate for every man, it would be impossible for the FDA to operate the way Mr. Friend thinks it ought to operate.

We feel, your Honor, that the essence of the case, the finding of bad faith, this evil intent, has not been shown by this evidence. The whole case shows a proper proceeding, a proper handling of the matter both by the Food and Drug Administration and by the Health, Education & Welfare Department representing the FDA, and certainly by the United States Attorney's office.

Mr. Randolph, as part of his duties, had to contemplate and work on both the civil and criminal aspects of this case, and many of the facts involved are the same. We can't deny that. That's it.

But the issue here is did the Government act in bad faith? I submit, your Honor, that bad faith, while it has many meanings, I am looking now at "Words and Phrases" under the general term, page 14. It says:

> "'Bad faith,' though an indefinite term, differs [fol. 333] from the negative idea of negligence, in that it contemplates a state of mind affirmatively operating with a furtive design or some motive of interest or ill will."

And I submit to the Court from the facts that have been adduced at this hearing, there has been no furtiveness, there has been no ill will, there has been no evidence to establish and overcome the presumption that these agencies did anything but operate in good faith; and therefore, I ask that the Court make a finding, as set forth in its motion, that the Government's motive in instituting the civil proceeding was in good faith.

THE COURT: Does the defendant desire to make any rebuttal argument?

MR. FRIEND: One statement.

THE COURT: If so, I will give you five minutes.

MR. FRIEND: Your Honor, I think I will cover it in less.

THE COURT: The Government have taken only twenty minutes to present their argument.

MR. FRIEND: Your Honor, we do not contend that the Food and Drug Act is wrong. We contend only that the manner of enforcement of the Act, which the FDA has arrogated unto itself, is what is wrong.

Mr. Trumbauer says that Congress has delegated the function to the Food and Drug Administration to start [fol. 334] civil and criminal cases. Your Honor, I submit that there isn't a word in the statute which authorizes the FDA to bring civil or criminal actions. The Act is supposed to be enforced by the Department of Justice. It is not correct that the FDA is the only authorized agency to enforce the act. In fact, it isn't authorized to enforce it at all. It is authorized only to investigate. It is the Department of Justice which is supposed to bring the civil actions or the criminal actions. And I say that while the—

MR. TRUMBAUER: We admit that, your Honor.

MR. FRIEND: Well, that's important, because you cited a case that indicated—an I.N.S. case, Immigration & Naturalization, where they do have a jurisdiction to start proceedings such as the F.P.C.; but in this case, all the FDA can do is investigate, and in this case they did more than that, because while the Department of Justice did the job, Judge, of filing the papers, in a true sense they were merely acting as the couriers for the Food and Drug Administration officials in Washington, who in every phase of this case that had any significance at all did try the case.

Now, one other point that I omitted before, sir. Mr. Randolph testified that he had had complete tapes of the lectures that were delivered and he had spent some time reading the lectures, reading of the lectures, and reading the tapes.

[fol. 335] Well, we had asked the Government for written interrogatories before we had known there was any criminal case, and the Government had answered them. And one of the questions we asked them was to provide

us with the text of the lectures, and a statement, sworn to by Mr. Milstead, was filed in this court, and I assume it came from the same department and the same gentleman who testified as being a subordinate of Mr. Milstead's—I am referring to additional answers to written interrogatories filed by the Government as part of the civil file:

> "Libelant does not now have complete verbatim texts of Kordel's lectures. There are attached as Exhibits D and E two documents which constitute those verbatim excerpts from his lectures which libelant has transcribed."

Now, admittedly this language is not as clear as it should be. That's the way they answer interrogatories, your Honor. But the fact is that when Mr. Randolph testified that he had had complete texts or tapes of the lectures, and on January or the end of January 1961 these verified answers had been submitted, I submit that the conclusion or an inference can be drawn, your Honor, that they didn't have everything that they might need, or maybe the tapes had been torn in the playing process, or some such thing as that, and at the very least there is a [fol. 336] suspicion as to whether the interrogatories or the answers to the interrogatories that they had asked of us didn't have some real significance as far as the criminal case is concerned.

I ask your Honor to make a finding in this case of not only bad faith on the part of the Food and Drug Administration, but indicating a very serious question of fair administration of criminal justice, where an agency who is not charged with the responsibility of returning indictments, prosecuting civil proceedings, in actual fact has decided that to make sure they win their cases, go ahead and practically try the case from beginning to end, and prepare all of the papers; and as a consequence, your Honor, this is different from the other cases that Mr. Trumbauer has cited. It is a unique situation which arises by reason of the fact that the Act itself has been perverted by the administrators of the Food and Drug Administration to allow them to, in effect, carry out

functions which should be the Department of Justice's functions.

And in that connection, your Honor, certain gentlemen appeared before the committee that Senator Long is—the Subcommittee on Judicial Administration—where the point was made by many counsel. So there can be no question about it any more that it is not the function of the Food and Drug Administration to enforce the law by filing of libels and preparing them, but that it should be made clear that it is a part of the Department of Justice, as it truly is.

[fol. 337] I therefore respectfully request that our motion be granted, your Honor, and that the answers to the interrogatories and admissions be suppressed and prohibited from being used in this trial, and the Government be put to the proof of trying this case, if in fact they have obtained the evidence from independent sources, as though there had never been a civil case.

THE COURT: This hearing was held pursuant to a request of the defendants in their motion to suppress evidence filed in this case on March 22, 1965. The request for the hearing was the alternative relief prayed for in that motion, which came on for hearing before this court on April 21, 1965. The motion was orally argued on that date and taken under advisement.

The Court filed a memorandum opinion dated June 3, 1965, and in that opinion granted the alternative relief requested by the defendants to determine whether the Government was proceeding in good faith when it filed the interrogatories in the civil suit, which is Case No. 21025 in this court, a proceeding before Judge Levin.

At the outset of this hearing, counsel for the defendants requested that the inquiry be broadened to include not only the filing of the interrogatories in that civil suit, but the filing of the suit itself; and the Court accepted that request and the hearing has been conducted covering the [fol. 338] entire proceedings in that civil case. So that I now have before me the issue of whether or not the Government was proceeding in good faith in filing of the civil suit and all proceedings thereunder, and particularly the filing of the interrogatories in that case. As a matter of

fact, this proceeding seems to have narrowed down pretty well to whether or not the Government was acting in good faith in filing the interrogatories in the civil suit.

This case is scheduled for a jury trial to commence next week Tuesday, being August 10, 1965. This is almost four-thirty on Friday afternoon preceding that date. I do not have before me the communications between my office and the Government and defense counsel with respect to the date set for this hearing, but in any event, the hearing was scheduled to commence on Wednesday of this week, being August 4th, and notice was given of this date by my Clerk some time ago.

In any event, the hearing has been held. Three days have been devoted to the hearing, and in the opinion of this Court, both the defendants and the Government have been given full opportunity to present all witnesses and all testimony that they desired to present that is or are relevant to the point here in issue.

I shan't attempt to review all of the evidence in this case. But having considered the evidence carefully [fol. 339] and all the arguments of counsel, and having read the rather numerous and sometimes lengthy exhibits offered in evidence, this Court is unable to find that the Government acted in bad faith in instituting the civil suit or in filing the interrogatories here in question; or more precisely, in the language of the Abel case, which was relied upon by both the Government and the defendants in the arguments on the motion to suppress, which I have already referred to, this Court does find that the civil action and the interrogatories filed in that action were not taken or filed for the purpose of amassing or procuring evidence to be used in the instant prosecution. In the Abel case, the court stated:

> "The test is whether the decision to proceed administratively toward deportation was influenced by an was carried out for a purpose of amassing evidence in the prosecution for crime."

Now, there, of course, the court was dealing with action taken by an administrative agency, and here the Court is dealing with the investigation and recommendations of

an administrative agency which, however, finally resulted in a civil case filed by the Government to condemn certain matter alleged to be drugs within the meaning of the statute.

It is true, as the Government has argued in this case, that the Food and Drug Administration are charged with the responsibility of investigating violations of the Food [fol. 340] and Drug laws, and the testimony in this case shows that very often that department proceeds both civilly and criminally because of the public interest. That is, that they may recommend forfeiture of the drugs involved, and in the civil injunctive process, to restrain the further use or sale, and so forth, of such material while at the same time considering the need for criminal prosecution.

Now, the mere fact that the agency may be proceeding along both lines simultaneously, in the opinion of this Court, is only a circumstance from which in a proper case it might be found that the decision to institute the civil proceeding or anything pursuant to the civil proceeding, such as the interrogatories here in question, was influenced by and carried out for the purpose of procuring evidence for the criminal case.

The testimony in this case shows—and it is not contradicted—that the Food and Drug Administration—more specifically, Mr. Randolph of the Washington office of that agency, had evidence before him which had been procured by the investigative agencies which he at least said was adequate to establish all of the elements of the criminal offense without resorting to the information which might be procured by the requests for admissions or interrogatories.

Now, the purpose of requests for admissions and interrogatories is too well known to take the time to detail [fol. 341] here in connection with this matter, but it is true, as one of the attorneys has testified, that at least one of the purposes of procuring information by requests for admissions and interrogatories is to not only narrow the issues, but to lay the foundation for a motion for summary judgment. And in a civil proceeding, this Court knows, as I think does every court, that another purpose of the use of such discovery proceedings is to

eliminate the need for producing witnesses, and thereby saving time and expense of producing what is sometimes a large number of witnesses who may be called from distant points and which would require considerable time of the court to establish a matter which may be admitted by the claimant in a civil proceeding.

I cannot infer from the testimony in this case that the mere use of the interrogatories was used to procure evidence which was not otherwise available to the Government to use in establishing some one or more of the elements in the instant prosecution.

For these reasons, the Court concludes that the Government did not act in bad faith in starting the civil suit or in filing the interrogatories; and therefore the request to suppress the evidence, under the tests laid down in the Abel case, is denied. An order may be submitted.

Now, this leaves one other matter yet to be disposed of before we proceed with the trial of this case. I received [fol. 342] this morning from counsel for the defendants a motion to quash the indictment, and I will set that motion down for hearing Monday morning, August 9th, at eleven o'clock. I have some other motions that morning, and I will hear those motions and I will be ready to hear arguments on this motion at eleven o'clock.

MR. FRIEND: Your Honor, I am coming in from Boston—my family is in Boston—and there is no plane that can get me in. I checked it this morning.

THE COURT: Well, but now you have filed this motion. Now, this case has been set for trial by a notice dated May 11, 1965, and I intended to mention that earlier. It has been set for a jury trial since that time. That's three months ago, and it is only on August 6 that this motion to quash the indictment was filed; and it may be a little bit inconvenient to you, but I am not going to hold up all of my court proceedings, including my motions which I have scheduled in other cases for that time and a number of pre-trials in the afternoon, and the trial of this case is scheduled and has been scheduled for a long time to commence the following day.

MR. FRIEND: Sir, I made the motion today because the information only come to my attention yesterday.

THE COURT: That may be; but you have had the opportunity to look for the information upon which you could base this motion ever since the prosecution was ini-
[fol. 343] tiated more than two years ago.

MR. FRIEND: Well, sir, as I understand the law, one cannot go in and just make a motion of this type unless they have something to go on.

THE COURT: I understand that, but—

MR. FRIEND: I am only asking your Honor for a couple of hours so I can make a plane connection.

THE COURT: As a matter of fact, I say this: that this information came about, so far as I can see, it was not within the scope of this hearing at all, and it was developed in the absence of Mr. Trumbauer, who was upstairs or somewhere looking for the grand jury minutes. And I thought at the time that it was not relevant to the precise inquiry here, and I think I so stated after you had been going along for some time asking questions of Mr. Fowler. I don't think it had a thing to do with the purpose of this hearing.

MR. FRIEND: Your Honor, I don't want to belabor the point except to indicate that in my motion to suppress, in my conclusion I had requested that a hearing be held to see what use had been made of the answers to the interrogatories; and in your Honor's order granting the motion part, you said, "a hearing as requested by the defendants"—

THE COURT: Now, I don't care to belabor this matter. It is now nearly going on 5:00 o'clock, and I am going to hear your motion, but I am going to hear it before
[fol. 344] the date of trial.

MR. FRIEND: Yes, sir.

THE COURT: And I will set it down for eleven o'clock Monday morning.

That's all. We will be in recess until Monday morning at nine-thirty.

CERTIFICATE

I, Evelyn R. Merrill, Official Court Reporter, do hereby certify that I reported in shorthand the foregoing proceedings had and testimony taken in the within-entitled matter before the Honorable Ralph M. Freeman, District Judge, at Detroit, Michigan, commencing on Wednesday, August 4, 1965; and that the foregoing transcript, consisting of three hundred forty-three (343) typewritten pages, constitutes a full, true and correct transcript of my said shorthand notes.

/s/ Evelyn R. Merrill
Official Court Reporter

Dated: Wednesday, September 1, 1965

21-144/6 R

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil No. ———

Filed June 9, 1960

UNITED STATES OF AMERICA

—*vs*—

An article of drug consisting of 39 cases, more or less, each containing 48 60-tablet bottles, and 1 case, containing 24 60-tablet bottles, more or less, labeled in part:

(bottle)

"Mich. Brand Korleen Tablets Contains: Choline Citrate, Inositol, Methionine, Cysteine, Niacinamide, Thiamin (Vitamin B1) with excipients. 60 tablets * * * Lelord Kordel of Michigan, Detroit * * * 6009"

an article of food and drug consisting of 3 cases, more or less, each containing 72 30-wafer bottles, and 1 case, containing 36 30-wafer bottles, more or less, labeled in part:

(bottle)

"Lelord Kordel's 'Frutex' Fruit Salad Natural Organic Vitamin C 30 Wafers * * * Nutrition Enterprises * * * Chicago * * * Each wafer provides 2000 Units (100 mg.) of Vitamin C * * *" (coded "84375") and

an article of food and drug consisting of 62 cases, more or less, each containing 24 100-wafer bottles, (coded "83861") and 26 cases, more or less, each containing 12 300-wafer bottles, (coded "84246"), labeled in part:

(bottle)

"Vital Foods Special Brand 'Frutex' Fruit Salad Natural Organic Vitamin C * * * Detroit Vital Foods, Inc., * * * Detroit, Mich. * * * Each wafer provides 2000 Units (100 mg.) of Vitamin C * * *"

and including undetermined quantities of leaflets entitled

"Is This a New Way to Strengthen Your Heart?", "Some Interesting Testimonials From Enthusiastic Followers", and "Special Lecture Prices" and undetermined numbers of two books by Lelord Kordel entitled "Eat and Grow Younger", and "How to Make People Like You", which leaflets and books accompany said articles and contain statements relating thereto.

LIBEL OF INFORMATION

TO: THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

Now comes the United States of America by Frederick W. Kaess, United States Attorney and Donald F. Welday, Jr., Assistant United States Attorney both for the Eastern District of Michigan, and show to this Honorable Court as follows:

1. That this libel is filed by the United States of America and prays seizure and condemnation of certain articles of food and drug, as hereinafter set forth, in accordance with the Federal Food, Drug, and Cosmetic Act, (21 U.S.C. 334).

2. That there are at Detroit, Michigan, in possession of Detroit Vital Foods, Inc., 20731 Seven Mile Road (office), 22131 Grand River (warehouse), and at the firm's retail establishments at 22000 Grand River, 1454 Broadway, and Eastland Shopping Center, Building G-704, Harper Woods, Michigan, the following.

(a) an article of drug consisting of 39 cases, more or less, each containing 48 60-tablet bottles, and 1 case, containing 24 60-tablet bottles, more or less, labeled in part:

(bottle)

"Mich. Brand Korleen Tablets Contains: Choline Citrate, Inositol, Methionine, Cysteine, Niacinamide, Thiamin (Vitamin B1) with excipients. 60 tablets * * * Lelord Kordel of Michigan, Detroit * * * 6009"

which was delivered to Detroit Vital Foods, Inc., on or about March 1, 1960, via local truck, after having been manufactured and packed into 60-tablet bottles, for the dealer by Freshman Vitamin Company, Oak Park, Michigan, under control number 6009, from active raw ingredients received in interstate commerce on various dates between July 1959 and January 1960 from (Choline, Inositol, and Methionine) New York Quinine and Chemical Works, New York, New York, via ABC truck; (Cysteine) Nutritional Biochemical Corporation, Cleveland, Ohio, via parcel post; and (Niacinamide and Thiamine) Merck & Company, St. Louis, Missouri, via (Niacinamide) McNamara Motor and (Thiamine) Michigan Express, and after having been labeled with labels furnished to the manufacturer by Detroit Vital Foods, Inc.;

(b) an article of food and drug consisting of 3 cases, more or less, each containing 72 30-wafer bottles, and 1 case, containing 36 30-wafer bottles, more or less, labeled in part:

(bottle)

"Lelord Kordel's 'Frutex' Fruit Salad Natural Organic Vitamin C 30 Wafers * * * Nutrition Enterprises * * * Chicago * * * Each wafer provides 2000 Units (100 mg.) of Vitamin C * * *" (coded "84375")

(c) an article of food and drug consisting of 62 cases, more or less, each containing 24 100-wafer bottles, (coded "83861") and 26 cases, more or less, each containing 12 300-wafer bottles, (coded "84246"), of an article labeled in part:

(bottle)

"Vital Foods Special Brand 'Frutex' Fruit Salad Natural Organic Vitamin C * * * Detroit Vital Foods, Inc., * * * Detroit, Mich. * * * Each wafer provides 2000 Units (100 mg.) of Vitamin C * * *"

which were shipped on or about (100-wafer bottles) January 12, 1960, (300-wafer bottles) March 4, 1960, and (30-wafer bottles) March 25 and 28, 1960, by Savoy Drug & Chemical Company, 16 South Peoria Street, Chicago, Illinois, via McNamara Motors Company; and including in the possession of the dealer at its office, warehouse, and retail establishments described above undetermined quantities of leaflets entitled "Is This a New Way to Strengthen Your Heart?", "Some Interesting Testimonials From Enthusiastic Followers", and "Special Lecture Prices", and undetermined numbers of two books by Lelord Kordel, namely, "Eat and Grow Younger", and "How to Make People Like You", which are used in promoting sales of said articles of food and drug and which accompany said articles as labeling and contain statements relating thereto.

3. That the aforesaid article labeled in part "Korleen" is a drug within the meaning of 21 U.S.C. 321(g) and is misbranded while held for sale after shipment in interstate commerce within the meaning of said Act, 21 U.S.C. as follows:

352(a) in that its labeling, namely, the leaflets entitled "Is This A New Way to Strengthen Your Heart?", "Some Interesting Testimonials From Enthusiastic Followers", and "Special Lecture Prices" and books entitled "Eat and Grow Younger" and "How to Make People Like You", accompanying said article, contains statements which represent and suggest that the article is an adequate and effective treatment for hardening of the arteries; defatting the arteries; liver and kidney troubles; heart attack; stroke; hemorrhage of the heart or liver; alcoholism; varicose veins; pains and cramps of varicose veins; old age; gall bladder diseases; and lowering of blood cholesterol; which statements are false and misleading, since the article is not an adequate and effective treatment for such conditions and purposes; and

352(f)(1) in that its labeling fails to bear adequate directions for use for the purposes, and conditions for which it is intended, namely, for the treatment and prevention of varicose veins; poor circulation; cholesterol and fatty deposits in the arteries; abnormal arteries; hardening of the arteries; degeneration of the liver; gall bladder diseases; cirrhosis of the liver; overweight and underweight; high blood pressure; arteriosclerosis; fibroid tumors of the uterus; spots of the liver; brown pigmentation spots on the skin; and prostate gland trouble; conditions for which the article was orally offered by Lelord Kordel in his talks on March 31, April 1, April 4, April 6, April 7, and April 8, 1960, at the Masonic Temple and Fort Wayne Hotel, Detroit, Michigan.

4. That the aforesaid articles labeled in part "Lelord Kordel's 'Frutex' Fruit Salad" and "Vital Foods * * * 'Frutex' Fruit Salad" are foods within the meaning of 21 U.S.C. 321(f) and were misbranded when introduced into and while in interstate commerce within the meaning of said Act, 21 U.S.C. 343(a) in that the label statement "Fruit Salad" with the listing of ingredients on the label and the inclusion in the composition of the articles of the ingredients acerola berry, apple, lemon, orange, apricot, peach, date, fig, grapefruit, and prune powders, which represent and suggest that the articles would supply to the diet the nutritive factors in a serving of the ingredients in their fresh state, is false and misleading, since the designated amount of the articles to be consumed would not provide the nutritional factors supplied by a serving of such ingredients in their fresh state.

5. That the aforesaid articles labeled in part "Lelord Kordel's 'Frutex' Fruit Salad" and "Vital Foods * * * 'Frutex' Fruit Salad" are drugs within the meaning of 21 U.S.C. 321(g) and are misbranded while held for sale after shipment in interstate commerce within the meaning of said Act, 21 U.S.C. as follows:

352(a) in that their labeling, namely, the leaflets entitled "Is This a New Way to Strengthen Your Heart?", "Some Interesting Testimonials From Enthusiastic Followers", and "Special Lecture Prices", and books entitled "Eat and Grow Younger" and "How to Make People

Like You", accompanying said articles, contains statements which represent and suggest that the articles are adequate and effective treatments for preventing premature aging; and to strengthen the artery walls and aid in reducing high blood pressure; that they play a big part in controlling the effect of brain fag by contributing to the health of the blood vessels of the brain and body; contribute to the health of the blood vessels in the brain and body, and aid in controlling brain fag; which statements are false and misleading since the articles are not adequate and effective treatments for such conditions and purposes; and

352(f)(1) in that their labeling fails to bear adequate directions for use for the purposes and conditions for which they are intended, namely, to treat and prevent air and food borne poisonings, impaired circulation, bleeding gums, soft gums, receding gums, nose bleeding, blood-shot eyes, capillary fragility, fever, aches and pains of fever, common colds, fatigue, alcoholism, loose teeth, sneezing, and pyorrhea; to prevent old age; hold cells together; neutralize the effects of cigarette smoke and impure air; prevent blood vessels and capilliaries from bursting; prevent cells within the retina from breaking down; improve the conditions of the blood vessels; help blood circulation; and neutralize the toxins in aspirin tablets; which are the purposes and conditions for which the articles were orally offered by Lelord Kordel in his talks on March 29, March 30, March 31, April 1, April 4, April 7, and April 8, 1960, at the Masonic Temple and Fort Wayne Hotel, Detroit, Michigan.

6. That the aforesaid articles are in the possession of Detroit Vital Foods, Inc., 20731 Seven Mile Road (office), 22131 Grand River (warehouse), and at the firm's retail establishments at 22000 Grand River, 1454 Broadway, and Eastland Shopping Center, Building G-704, Harper Woods, Michigan, at Detroit, Michigan, or elsewhere within the jurisdiction of this Court.

7. That by reason of the foregoing, the aforesaid articles are held illegally within the jurisdiction of this Court, and are liable to seizure and condemnation pursuant to the provisions of said Act, 21 U.S.C. 334.

WHEREFORE, libellant prays that process in due form of law according to the course of this Court in cases of admiralty jurisdiction issue against the aforesaid articles; that all persons having any interest therein be cited to appear herein and answer the aforesaid premises; that this Court decree the condemnation of the aforesaid articles and grant libellant the costs of this proceeding against the claimant of the aforesaid articles; that the aforesaid articles be disposed of as this Court may direct pursuant to the provisions of said Act; and that libellant have such other and further relief as the case may require.

Dated: _____, 1960

UNITED STATES OF AMERICA

_____

FREDERICK W. KAESS
United States Attorney

_____

DONALD F. WELDAY, JR.
Assistant U. S. Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil No. 20215

Granted 1/23/61

UNITED STATES OF AMERICA

v.

AN ARTICLE OF DRUG . . . "MICH. BRAND KORLEEN TABLETS" . . . ETC.

ORDER

On motion of the United States of America, libelant, by its attorneys, to amend the libel filed in this action, pursuant to Rule 15(a):

IT IS HEREBY ORDERED that the United States of America be and is given leave to amend the Libel heretofore filed; and it is further

ORDERED that the Libel be and hereby is amended as follows:

1. Amend paragraph 4 of the Libel to read as follows:

"4. That the aforesaid article labeled in part "Vital Foods * * * 'Frutex' Fruit Salad" is a food within the meaning of 21 U.S.C. 321(f) and was misbranded when introduced into, while in, and while held for sale after shipment in interstate commerce within the meaning of said Act as follows:

21 U.S.C. 343(a) in that the label statement "Fruit Salad" with the listing of ingredients on the label and the inclusion in the composition of the article of the ingredients acerola berry, apple, lemon, orange, apricot, peach, date, fig, grapefruit, and prune powders, which represent

and suggest that the article would supply to the diet the nutritive factors in a serving of the ingredients in their fresh state, is false and misleading, since the designated amount of the article to be consumed would not provide the nutritional factors supplied by a serving of such ingredients in their fresh state;

21 U.S.C. 343(a) in that the statement "Natural Organic Vitamin C" contained in the label and in the labeling, to wit, the leaflet entitled "Special Lecture Prices" which accompanies said article, represents and suggests that the Vitamin C content of the article is natural organic Vitamin C and is derived solely from the fruit ingredients contained in the article; which representations and suggestions are false and misleading, since all the Vitamin C in the article is not natural organic Vitamin C and is not derived solely from the fruit ingredients of the article;

21 U.S.C. 343(a) in that the label statement "Rose Hips Vitamin C" represents and suggests that the article contains substantial quantities of Vitamin C derived from Rose Hips, which representation and suggestion is false and misleading since the article contains little or no Vitamin C derived from Rose Hips;

21 U.S.C. 343(i)(2) in that its label fails to bear the common or usual name of each ingredient contained therein, since the article contains dextrose, lactose, honey, citric acid, ascorbic acid, and calcium stearate, and these ingredients are not listed on the label.

2. Amend paragraph 5 of the Libel to read as follows:

"5. That the aforesaid article labeled in part "Frutex . . . Fruit Salad" is a food within the meaning of 21 U.S.C. 321(f) and is further misbranded while held for sale after shipment in interstate commerce within the meaning of said

Act, 21 U.S.C. 343(a) in that its labeling, namely, the leaflet entitled "Special Lecture Prices", accompanying the article, contains a vignette depicting natural ripe fruit, the statement "made with 16 fruits" and a listing of ingredients, which represent and suggest that the article is made from fresh fruit; which representation and suggestion is false and misleading since the article is not made from fresh fruit.

3. Amend paragraph 6 of the Libel to read as follows:

"6. That the aforesaid article labeled in part "Vital Foods * * * 'Frutex' Fruit Salad" is a drug within the meaning of 21 U.S.C. 321(g) and is misbranded while held for sale after shipment in interstate commerce within the meaning of said Act, 21 U.S.C. as follows:

352(a) in that its labeling, namely, the leaflets entitled "Special Lecture Prices", and the books entitled "Eat and Grow Younger", "Eat Your Troubles Away", and "How to Make People Like You", accompanying said article, contains statements which represent and suggest that the article is an adequate and effective treatment for preventing premature aging; and to strengthen the artery walls and aid in reducing high blood pressure; that it is a detoxifying agent and tissue mender; that it plays a big part in controlling the effect of brain fag by contributing to the health of the blood vessels of the brain and body; helps prevent profuse menstruation and menstrual pains, reduces the death rate from typhoid fever; contributes to the health of the blood vessels of the brain and body; aids in controlling brain fag; and prevents and controls colds, chills, fever, sore throats, earache, phrayngitis, swollen neck glands, pneumonia, acute rheumatism, dysentery, polio and influenza; which statements are false and misleading since the article is not an adequate and effective treatment for such conditions and purposes; and

352(f)(1) in that its labeling fails to bear adequate directions for use for the purposes and conditions for which it is intended, namely, to treat and prevent air and food borne poisonings, impaired circulation, bleeding gums, soft gums, receding gums, nose bleeding, blood-shot eyes, capillary fragility, fever, aches and pains of fever, common colds, fatigue, alcoholism, loose teeth, sneezing, and pyorrhea; to prevent old age; hold cells together; neutralize the effects of cigarette smoke and impure air; prevent blood vessels and capillaries from bursting; prevent cells within the retina from breaking down; improve the condition of the blood vessels, help blood circulation; and neutralize the toxins in aspirin tablets; which are the purposes and conditions for which the article was orally offered by Lelord Kordel in his talks on March 29, March 30, March 31, April 1, April 4, April 7, and April 8, 1960, at the Masonic Temple and Fort Wayne Hotel, Detroit, Michigan.

4. Change present paragraph "6" to "7".
5. Change present paragraph "7" to "8".

Dated: ....., 1961.

United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 20215

Filed Sept. 12, 1960

UNITED STATES OF AMERICA

vs.

AN ARTICLE OF DRUG CONSISTING OF 39 CASES . . . KORLEEN . . . "FRUITEX" ETC.

ANSWER

The claimant herein, by its attorneys, answering the libel herein, respectfully alleges:

1. Denies knowledge and information sufficient to form a belief as to the allegations set forth in paragraph 1 of the libel of information.

2. Denies each and every allegation set forth in paragraph 2(a) of the libel of information except admits that the article therein described was delivered to Detroit Vital Foods, Inc. on or about March 1, 1960 via local truck, after having been manufactured and packed into sixty-tablet bottles for the claimant by Freshman Vitamin Company, Oak Park, Michigan, and further admits that the label therein referred to is only a part of the said label, the complete label containing the following additional language: "manufactured in Detroit, Michigan, for distribution within the State of Michigan only".

3. Denies each and every allegation set forth in paragraph 2(b) of the libel of information and further alleges that the article therein described was and is not in the possession of the claimant at either its office, warehouse or retail establishments and was not seized.

4. Admits each and every allegation set forth in paragraph 2(c) of the libel of information except denies that the literature and books therein referred to are used in promoting the sale of the article referred to in paragraph

2(c) and futher denies that the said literature and books accompany the said article as labeling or contain statements relating thereto.

5. Denies each and every allegation contained in paragraphs 3, 4, 5 and 7 of the libel of information.

6. Denies each and every allegation contained in paragraph 6 of the libel of information except admits that the articles referred to in paragraphs 2(a) and 2(c) of the libel of information are in the possession of Detroit Vital Foods, Inc.

WHEREFORE, having fully answered, claimant respectfully prays that the libel herein filed be dismissed and that claimant have such other and further relief as to the Court may seem just and proper.

/s/ Bass & Friend
BASS & FRIEND
Attorneys for Claimant
Office and Post Office Address
342 Madison Avenue
New York 17, N. Y.

WRITTEN INTERROGATORIES

(Companion Civil Case No. 20215)

Comes now the United States of America, Libelant herein, by George E. Woods, Jr., United States Attorney for this District, and Jerome A. Moore, Assistant United States Attorney, and submits the following written interrogatories pursuant to Rule 33 of the Federal Rules of Civil Procedure for United States District Courts:

1. Does the claimant admit that:
   (a) Lelord Kordel is president of claimant, Detroit Vital Foods, Inc.?
   (b) Other names used by claimant corporation are:
      (1) Vital Foods, Inc.;
      (2) Lelord Kordel;
      (3) Health Today Company;
      (4) Kordel of Michigan;
      (5) Nutritional Sales;
      (6) Nutrition Enterprises?
2. If the answer to any part of Interrogatory 1 is anything other than an unqualified affirmative response, then state in detail what claimant contends the true facts to be and state the name and address of each person having personal knowledge of the truth of each of such facts.
3. Does the claimant admit that the article "Korleen" tablets seized in this action was manufactured by Freshman Vitamin Company from raw materials received in interstate commerce as follows:
   (a) Choline, Inositol and Methionine from New York Quinine and Chemical Works, New York, New York;
   (b) Niacinamide and Thiamine from Merck and Company, St. Louis, Missouri?
4. If the answer to any part of Interrogatory 3 is anything other than an unqualified affirmative response, then state in detail what claimant contends the true

facts to be and state the name and address of each person having personal knowledge of the truth of each of such facts.

5. Does claimant admit that it furnished to Freshman Vitamin Company the label to be applied to the bottles of "Korleen" tablets?
6. If the answer to any part of Interrogatory 5 is anything other than an unqualified affirmative response, then state in detail what claimant contends the true facts to be and state the name and address of each person having personal knowledge of the truth of each of such facts.
7. Does claimant admit that "Korleen" tablets is an article intended for use in the cure, mitigation, treatment, or prevention of disease?
8. Does claimant admit that "Korleen" tablets are intended to be used as an adequate and effective treatment for:

   (a) hardening of the arteries;
   (b) defatting the arteries;
   (c) liver and kidney troubles;
   (d) heart attack;
   (e) stroke;
   (f) hemorrhage of the heart or liver;
   (g) alcoholism;
   (h) varicose veins;
   (i) pains and cramps of varicose veins;
   (j) old age;
   (k) gall bladder diseases
   (l) lowering of blood cholesterol?

9. If the answer to any part of Interrogatories 7 and 8 are anything other than unqualified affirmative responses, then state in detail the purposes and conditions for which claimant contends the Korleen tablets are intended to be used.
10. Does the claimant admit that Exhibit A, attached, is a true and accurate copy of an advertisement claimant had published in the March 28, 1960 edition of the Detroit News?

11. Does the claimant admit that Lelord Kordel delivered a series of nine lectures at Detroit, Michigan, beginning March 29, 1960 and ending April 8, 1960?
12. Does the claimant admit that the leaflet entitled "Is This a New Way to Strenthen Your Heart?", a copy of which is attached as Exhibit B, was distributed to each person attending Lelord Kordel's lecture on April 1, 1960 held in the ballroom of the Fort Wayne Hotel, Detroit, Michigan?
13. Does the claimant admit that the leaflet entitled "Some Interesting Testimonials From Enthusiastic Followers," a copy of which is attached as Exhibit C, was distributed to each person attending Lelord Kordel's lecture on April 5, 1960?
14. Does the claimant admit that the leaflet entitled "Special Lecture Prices," a copy of which is attached as Exhibit D, was distributed to persons attending Lelord Kordel's lectures on April 4, 5, and 6, 1960?
15. If the answer to any portion of Interrogatories 10-14, inclusive, is anything other than an unqualified affirmative response, then state in detail what claimant contends the true facts to be and state the name and address of each person having personal knowledge of the truth of each of such facts.
16. State in detail:
    (a) The name, address, and professional qualifications of each person who took part in drafting and/or approved the draft of Exhibits A, B, C, and D;
    (b) The name, address, and professional qualifications of each physician or other scientist relied upon by claimant to support the representations made in Exhibits A, B, C, and D;
    (c) Complete citations to all medical and scientific literature relied upon by claimant to support the representations made in Exhibits A, B, C, and D.
17. State the page numbers and references in the books "Eat and Grow Younger," "How to Make People Like You," and "Eat Your Troubles Away" from

which Lelord Kordel read during his lectures at Detroit, Michigan, from March 29, 1960 through April 8, 1960.

18. Does the claimant admit that during his lectures in Detroit, Michigan, on March 31, April 1, April 4, April 6, April 7, and April 8, 1960, Lelord Kordel orally offered "Korleen" tablets for use for the following purposes and conditions:

    (a) varicose veins;
    (b) poor circulation;
    (c) cholesterol and fatty deposits in the arteries;
    (d) abnormal arteries;
    (e) hardening of the arteries;
    (f) degeneration of the liver;
    (g) gall bladder diseases;
    (h) cirrhosis of the liver;
    (i) overweight and underweight;
    (j) high blood pressure;
    (k) arteriosclerosis;
    (l) fibroid tumors of the uterus;
    (m) spots of the liver;
    (n) brown pigmentation spots on the skin;
    (o) prostate gland trouble?

19. If the answer to Interrogatory 18 is anything other than an unqualified affirmative response, then state each and every purpose and condition for which "Korleen" was offered by Lelord Kordel during the lectures referred to.
20. Does claimant admit that during the lectures referred to, Lelord Kordel made a statement to the effect that Vital Food Stores was sponsoring the lectures?
21. Does claimant admit that during the lectures referred to, Lelord Kordel referred to his "books," and specifically to the book "Eat and Grow Younger," which he recommended as the basic book to be used by persons who wished to follow his program?
22. Does claimant admit that during the lectures referred to, Lelord Kordel told the persons present that his books "Eat and Grow Younger," "Eat Your Troubles Away," and "How to Make People Like You":

(a) could be purchased in the foyer during intermission; and that these books were actually on sale in the foyer during the course of the lectures;
(b) could be purchased at Vital Food Stores in Detroit, Michigan, and that these books were actually on sale at Vital Food stores?

23. Does claimant admit that during the lectures referred to, Lelord Kordel told the persons present that the products "Korleen" and "Vital Foods Special Brand 'Frutex' Fruit Salad":

(a) could be purchased in the foyer during intermission, and that these products were actually on sale in the foyer during the course of the lectures;
(b) could be purchased at Vital Food Stores in Detroit, Michigan, and that these products were actually on sale at Vital Food Stores?

24. If the answer to any portion of Interrogatories 20, 21, 22, and 23 is anything other than an unqualified affirmative response, then state in detail what claimant contends the true facts to be and give the name, and address of each person having personal knowledge of the truth of each of such facts.

25. Does claimant admit that a lay person who is suffering or who thinks he is suffering from any of the following diseases or conditions is not competent to diagnose and/or treat such disease or condition, but should consult a physician:

(a) varicose veins;
(b) poor circulation;
(c) cholesterol and fatty deposits in the arteries;
(d) abnormal arteries;
(e) hardening of the arteries;
(f) degeneration of the liver;
(g) gall bladder diseases;
(h) cirrhosis of the liver;
(i) overweight and underweight;
(j) high blood pressure;

(k) arteriosclerosis;
(l) fibroid tumors of the uterus;
(m) spots of the liver;
(n) brown pigmentation spots on the skin;
(o) prostate gland trouble?

26. Does claimant admit that two to four tablets daily of "Korleen" is not effective in the treatment or cure of each of the diseases and conditions listed in Interrogatory 25;

27. For each of the diseases and conditions listed in Interrogatory 25, state in detail the causes of each such disease and condition and how each of the ingredients in "Korleen," singly or in combination affects such causes.

28. If the answer to any part of Interrogatories 25 and 26 is anything other than an unqualified affirmative response, then state:

(a) for each such other response, state what claimant contends the true facts to be;
(b) for each such other response, give the name, address, and professional qualifications of each person having personal or expert knowledge of the truth of each such response;
(c) if medical or scientific literature is relied upon by claimant to support any such response, give complete citations to such literature;
(d) whether claimant relies upon any tests or studies which it has conducted, or had conducted for it, or about which it knows, to support such response.

29. If the answer to Interrogatory 28(d) above is affirmative, then for each such test or study, state the following:

(a) the date each test or study was commenced and the date each terminated; identifying the date with the test or study;
(b) the name and address of each hospital, clinic, laboratory or other facility where each such test or study was conducted, identifying the facility with the test or study;

(c) the name, address, and professional qualifications of each person who conducted or participated in the conduct of each such test or study, identifying each person with each test or study;

(d) the duties and functions of each person named in response to part (c) above;

(e) the name, address and age of each person who was a subject of each test or study, identifying the person with the test or study, and stating for each person whether that person was a test or control subject;

(f) the name and address of each physician who examined each subject named in response to part (e) above prior to and subsequent to the test or study, identifying the physician with the subject, and giving the diagnosis in each case;

(g) the name and complete qualitative and quantitative formula of each of the test substances, including placebos, if any, which was administered to or taken by each of the subjects in each test or study, identifying the substance with the subject;

(h) the dosage, frequency, duration, time and route of administration of each of the test substances, including placebos, which was administered to, or taken by, each subject, identifying the dosage with the subject;

(i) for each subject, either test or control, state whether any dietary restrictions or recommendations were placed on that subject during the course of each test or study;

(j) if the answer to part (i) above is affirmative, then for each such subject, specify the dietary restrictions or recommendations which were placed upon that subject and give the daily caloric total of the restricted or recommended diet;

(k) for each such test or study, state the address at which the records or reports are located and the name and address of the person having custody or possession of such records or reports;

(l) if reports of any such test or study have been published, give the full citation to the scientific journal or periodical in which such reports were published;

(m) if any such tests or studies are presently in progress, provide as much information as is in existence in answer to (a) through (l) above.

30. Does claimant admit that nowhere in the labeling of "Korleen" are there any directions given which would enable a lay person to diagnose the existence in himself of any of the diseases or conditions listed in Interrogatory 25, or to ascertain whether or not there has been any change in such disease or condition in himself?

31. If the answer to Interrogatory 30 is anything other than an unqualified affirmative response, then state where in the labeling of "Korleen" such directions are given.

32. Does claimant admit that Exhibits B and/or C and/or D and/or the books entitled "Eat and Grow Younger" and "How to Make People Like You," contain statements which represent and suggest that "Korleen" is an adequate and effective treatment for:

(a) hardening of the arteries;
(b) defatting the arteries;
(c) liver and kidney troubles;
(d) heart attack;
(e) stroke;
(f) hemorrhage of the heart or liver;
(g) alcoholism;
(h) varicose veins;
(i) pains and cramps of varicose veins;
(j) old age;
(k) gall bladder diseases;
(l) lowering of blood cholesterol?

33. If the answer to Interrogatory 32 is anything other than an unqualified affirmative response, then state in detail what claimant contends the true facts to be and state the name and address of each person

having personal knowledge of the truth of each of such facts.

34. For each of the diseases and conditions listed in Interrogatory 32, state in detail:

(a) the cause of such disease or condition and how each of the ingredients in "Korleen" singly or in combination, affects such causes;
(b) the name, address and professional qualifications of each person having personal or expert knowledge of the truth of the response to part (a) above;
(c) complete citations to all medical and scientific literature which supports, contradicts or varies, or in any way specifically deals with the response to (a) above;
(d) if any tests or studies are relied upon by claimant to support the response to (a) above, then for each such test or study, provide the information called for in Interrogatory 29.

35. Does the claimant admit that "Korleen" is not an adequate and and effective treatement for:

(a) hardening of the arteries;
(b) defatting the arteries;
(c) liver and kidney troubles;
(d) heart attack;
(e) stroke;
(f) hemorrhage of the heart or liver;
(g) alcoholism;
(h) varicose veins;
(i) pains and cramps of varicose veins;
(j) old age;
(k) gall bladder diseases;
(l) lowering of blood cholesterol?

36. If the answer to Interrogatory 35 is anything other than an unqualified affirmative response, then state in detail:

(a) The name, address, and professional qualifications of each person having personal or expert knowledge of the fact that "Korleen" is an ade-

quate and effective treatment for each of the diseases and conditions listed in Interrogatory 35;

(b) Complete citations to all medical or scientific literature which supports, contradicts or varies, or in any way specifically deals with, the contention that "Korleen" is an adequate and effective treatment for each of the diseases and conditions listed in Interrogatory 35;

(c) If any tests or studies are relied upon by claimant to support the response to Interrogatory 35, then for each such test or study, provide the information called for in Interrogatory 29.

37. State:

(a) the name and address of any hospital or other medical facility known to claimant in which "Korleen" tablets are used for the treatment of any of the conditions listed in Interrogatory 35, or for any other purpose or condition;

(b) the name, address, and professional qualifications of each person who is familiar with the use of "Korleen" tablets in each hospital or other facility listed in response to part (a) above.

38. Does the claimant admit that the leaflets entitled "Is This A New Way to Strengthen Your Heart?"; "Some Interesting Testimonials From Enthusiastic Followers"; "Special Lecture Prices"; and the books "Eat and Grow Younger" and "How to Make People Like You" contain statements relating to "Korleen" tablets and/or "Vital Foods Special Brand 'Frutex' Fruit Salad"?

39. If the answer to any part of Interrogatory 38 is anything other than an unqualified affirmative response, then state in detail what claimant contends the true facts to be.

40. Does claimant admit that Exhibit E is a true and accurate copy of the label from the seized "Korleen" tablets?

41. Does claimant admit that Exhibit F is a true and accurate copy of the label from the seized "Vital Foods Special Brand 'Frutex' Fruit Salad"?
42. If the answer to any part of Interrogatories 40 and 41 is anything other than an unqualified affirmative response, then state in detail what claimant contends the true facts to be and state the name and address of each person having personal knowledge of the truth of each of such facts.
43. Does the claimant admit that "Vital Foods Special Brand 'Frutex' Fruit Salad" is represented to be a food?
44. Does the claimant admit that the list of ingredients on the "Vital Foods Special Brand 'Frutex' Fruit Salad" label represents and suggests that the taking of the recommended amount of "Frutex" would supply the taker with the nutritive value of a serving of each of the ingredients in their fresh state?
45. Does the claimant admit that a person taking the recommended amount of "Frutex" wafers daily would not derive therefrom the nutritive value of each of the ingredients in their fresh state?
46. If the answer to any part of Interrogatories 43, 44, or 45 is anything other than an unqualified affirmative response, then state in detail:
    (a) for each such other response, state what claimant contends the true facts to be;
    (b) for each such other response, give the name, address, and professional qualifications of each person having personal or expert knowledge of the truth of such contentions;
    (c) complete citations to all medical and scientific literature which support, contradicts, or varies, or in any way specifically deals with, each such response;
    (d) if any tests or studies are relied upon by claimant to support such a response, then for each such test or study, provide the information called for in Interrogatory 29.
47. Does the claimant admit that "Vital Foods Special Brand 'Frutex' Fruit Salad" is an article intended

for use in the cure, mitigation, treatment, or prevention of disease and/or to affect the structure and function of the body?

48. Does the claimant admit that "Vital Foods Special Brand 'Frutex' Fruit Salad" is intended to be used:

(a) as an adequate and effective treatment;

(I) for preventing premature aging;
(II) to strengthen artery walls;
(III) to aid in reducing high blood pressure;

(b) to play a big part in controlling the effect of brain fag by contributing to the health of the blood vessels of the brain and body;
(c) to contribute to the health of the blood vessels in the brain and body;
(d) to aid in controlling brain fag?

49. If the answer to any part of Interrogatories 47 and 48 is anything other than an unqualified affirmative response, then state in detail the purposes and conditions for which claimant contends that "Vital Foods Special Brand 'Frutex' Fruit Salad" is intended to be used.

50. Does the claimant admit that Exhibits B and/or C and/or D and/or the books entitled "Eat and Grow Younger" and "How to Make People Like You" contain statements which represent and suggest that "Vital Foods Special Brand 'Frutex' Fruit Salad":

(a) is an adequate and effective treatment:

(I) for preventing premature aging;
(II) to strengthen artery walls;
(III) to aid in reducing high blood pressure;

(b) plays a big part in controlling the effect of brain fag by contributing to the health of the blood vessels of the brain and body;
(c) contribute to the health of the blood vessels in the brain and body;
(d) aids in controlling brain fag?

51. If the answer to any part of Interrogatory 50 is anything other than an unqualified affirmative response, then state in detail what claimant contends the true facts to be and give the name and address of each person having personal knowledge of the truth of each of such facts.
52. Does the claimant admit that "Vital Foods Special Brand 'Frutex' Fruit Salad":

    (a) is not an adequate and effective treatment:

        (I) for preventing premature aging;
        (II) to strengthen the artery walls;
        (III) to aid in reducing high blood pressure;

    (b) does not play a big part in controlling the effect of brain fag by contributing to the health of the blood vessels of the brain and body;
    (c) does not contribute to the health of the blood vessels of the brain and body;
    (d) does not aid in controlling brain fag?

53. If the answer to any part of Interrogatory 52 is anything other than an unqualified affirmative response, then state:

    (a) for each such other response, state what claimant contends the true facts to be;
    (b) for each such other response, give the name, address, and professional qualifications of each person having personal or expert knowledge of the truth of the response;
    (c) complete citations to all medical and scientific literature which supports, contradicts, or varies, or in any way specifically deals with, each such response;
    (d) if any tests or studies are relied upon by claimant to support such a response, then provide the information called for in Interrogatory 29.

54. Does claimant admit that during his lectures in Detroit, Michigan, on March 29, 30, and 31 and April 1, 4, 7, and 8, 1960, Lelord Kordel orally offered

"Vital Foods Special Brand 'Frutex' Fruit Salad" for the following purposes and conditions:

(a) to treat and prevent:

(I) air and food borne poisonings;
(II) impaired circulation;
(III) bleeding gums;
(IV) soft gums;
(V) receding gums;
(VI) nose bleeding;
(VII) blood-shot eyes;
(VIII) capillary fragility;
(IX) fever;
(X) aches and pains of fever;
(XI) common colds;
(XII) fatigue;
(XIII) alcoholism;
(XIV) loose teeth;
(XV) sneezing;
(XVI) pyorrhea;

(b) to prevent old age;
(c) to hold cells together;
(d) to neutralize the effects of cigarette smoke and impure air;
(e) to prevent cells within the retina from breaking down;
(f) to improve the condition of the blood vessels;
(g) to help blood circulation;
(h) to neutralize the toxins in aspirin tablets?

55. If the answer to any part of Interrogatory 54 is anything other than an unqualified affirmative response, then state each and every purpose and condition for which "Vital Foods Special Brand 'Frutex' Fruit Salad" was offered by Lelord Kordel during the lectures referred to. It was not offered for sale at lectures referred to.

56. Does claimant admit that a lay person is not competent to diagnose and prescribe for himself medication for the following purposes:

(a) to treat and prevent:

(I) air and food borne poisonings;
(II) impaired circulation;
(III) bleeding gums;
(IV) soft gums;
(V) receding gums;
(VI) nose bleeding;
(VII) blood-shot eyes;
(VIII) capillary fragility;
(IX) fever;
(X) aches and pains of fever;
(XI) common colds;
(XII) fatigue;
(XIII) alcoholism;
(XIV) loose teeth;
(XV) sneezing;
(XVI) pyorrhea;

(b) to prevent old age;
(c) to hold cells together;
(d) to neutralize the effects of cigarette smoke and impure air;
(e) to prevent cells within the retina from breaking down;
(f) to improve the condition of the blood vessels;
(g) to help blood circulation;
(h) to neutralize the toxins in aspirin tablets?

57. Does claimant admit that one to six wafers daily of "Vital Foods Special Brand 'Frutex' Fruit Salad" is not effective for the purposes set forth in Interrogatory 56?

58. If the answer to any part of Interrogatory 56 and 57 is anything other than an unqualified affirmative response, then state:

(a) for each such other response, state what claimant contends the true facts to be;
(b) for each such other response, give the name, address, and professional qualifications of each person having personal or expert knowledge of the truth of each such response;

(c) if medical or scientific literature is relied upon by claimant to support any such response, give complete citations to such literature;
(d) if claimant relies upon any tests or studies to substantiate any such response, then for each such test or study provide the information called for in Interrogatory 29.

59. For each of the conditions set forth in Interrogatory 56, state in detail:

(a) the causes of each such condition;
(b) how each of the ingredients in "Vital Foods Special Brand 'Frutex' Fruit Salad," singly or in combination, affects such condition;
(c) the name, address, and professional qualifications of each person having personal or expert knowledge of the truth of the responses to (a) and (b) above;
(d) complete citations to all medical and scientific literature which supports, contradicts, or varies, or in any manner specifically deals with, the responses to (a) and (b) above;
(e) if claimant relies upon any tests or studies to substantiate the responses to (a) or (b) above, then for each such test or study, provide the information called for in Interrogatory 29.

60. Does claimant admit that nowhere in the labeling of "Vital Foods Special Brand 'Frutex' Fruit Salad" are there any directions given which would enable a lay person to diagnose the existence in himself of any of the conditions listed in Interrogatory 56; or to ascertain whether or not there has been any change in such condition in himself?

61. If the answer to Interrogatory 60 is anything other than an unqualified affirmative response, then state where in the labeling of "Vital Foods Special Brand 'Frutex' Fruit Salad" such directions are given.

62. Does claimant admit that the following items were seized on the premises of Detroit Vital Foods, Inc., Detroit, Michigan, on June 13, 1960:

(a) 28 cases containing 48 60-tablet bottles each of "Mich. Brand Korleen Tablets";
(b) 1 case containing 26 60-tablet bottles of "Mich. Brand Korleen Tablets";
(c) 50 bottles, each containing 100 wafers of "Vital Foods Special Brand 'Frutex' Fruit Salad";
(d) 18 bottles, each containing 300 wafers of "Vital Foods Special Brand 'Frutex' Fruit Salad";
(e) 205 books entitled "Eat and Grow Younger";
(f) 700 books entitled "How to Make People Like You";
(g) 1 leaflet entitled "Is This a New Way to Strengthen Your Heart?";
(h) 168 leaflets entitled "Some Interesting Testimonials"?

63. If the answer to any portion of Interrogatory 62 is anything other than an unqualified affirmative response, then for each such other response, state in detail what claimant contends the true facts to be and the name and address of each person having personal knowledge of the truth of each of such facts.
64. Describe fully the nature of any business relationship between Lelord Kordel and the Vital Food Stores in Detroit, Michigan.
65. State the name and address of each person whom the claimant intends to call as a witness in the trial of this case.

_____
United States Attorney

/s/ JEROME A. MOORE
Assistant United States Attorney

ADDITIONAL WRITTEN INTERROGATORIES

(Companion Civil Case No. 20215)

Comes now the United States of America, Libelant herein, by Lawrence Gubow, United States Attorney for this District, and Jerome A. Moore, Assistant United States Attorney, and submits the following additional written interrogatories pursuant to Rule 33 of the Federal Rules of Civil Procedure for United States District Courts:

1. With respect to "Vital Foods Special Brand 'Frutex' Fruit Salad," state in detail:
   (a) the name and address of the manufacturer of the article;
   (b) the name and address of the person or firm which packed the manufactured article into bottles of 30, 100, and 300 wafers each; and
   (c) the name, address, and qualifications of each person who designed, assisted in designing, or was consulted about the design of, the label for the article.
2. State the complete qualitative and quantitative composition of a "Vital Foods Special Brand 'Frutex' Fruit Salad" wafer, giving the actual amount, by weight, of each ingredient contained in a wafer.
3. State the complete qualitative and quantitative composition of a manufacturing batch of "Vital Foods Special Brand 'Frutex' Fruit Salad," giving the actual amount, by weight, of each ingredient contained in the batch.
4. State how many wafers are contained in a manufacturing batch of "Vital Foods Special Brand 'Frutex' Fruit Salad."
5. State the average weight of a "Vital Foods Special Brand 'Frutex' Fruit Salad" wafer.
6. State what per cent of the total weight of a manufacturing batch of "Vital Foods Special Brand 'Frutex' Fruit Salad" is contributed by:

(a) Rose Hips;
(b) Acerola Berry;
(c) Apple powder;
(d) Lemon powder;
(e) Orange powder;
(f) Apricot powder;
(g) Peach powder;
(h) Date powder;
(i) Fig powder;
(j) Grapefruit powder;
(k) Prune powder;
(l) Blackberry flavor;
(m) Cherry flavor;
(n) Grape flavor;
(o) Loganberry flavor;
(p) Pineapple flavor;
(q) Raspberry flavor;
(r) Strawberry flavor;
(s) Synthetically produced ascorbic acid.

7. State what per cent of the total weight of a single "Vital Foods Special Brand 'Frutex' Fruit Salad" wafer is contributed by:

(a) Rose Hips;
(b) Acerola Berry;
(c) Apple powder;
(d) Lemon powder;
(e) Orange powder;
(f) Apricot powder;
(g) Peach powder;
(h) Date powder;
(i) Fig powder;
(j) Grapefruit powder;
(k) Prune powder;
(l) Blackberry flavor;
(m) Cherry flavor;
(n) Grape flavor;
(o) Loganberry flavor;
(p) Pineapple flavor;
(q) Raspberry flavor;
(r) Strawberry flavor;
(s) Synthetically produced ascorbic acid.

8. If the percentages given in answer to Interrogatory 6 or Interrogatory 7 add up to a sum total of less than 100%, then name each other ingredient contained in "Vital Foods Special Brand 'Frutex' Fruit Salad" and state what percent of the total weight of the product each such ingredient contributes.
9. State how many milligrams of Vitamin C are contained in:

   (a) a manufacturing batch of "Vital Foods Special Brand 'Frutex' Fruit Salad";
   (b) a single 'Frutex' wafer.

10. State how many milligrams of Vitamin C are contributed to a manufacturing batch of "Vital Foods Special Brand 'Frutex' Fruit Salad" by:

   (a) Rose Hips;
   (b) Acerola Berry;
   (c) Apple powder;
   (d) Lemon powder;
   (e) Orange powder;
   (f) Apricot powder;
   (g) Peach powder;
   (h) Date powder;
   (i) Fig powder;
   (j) Grapefruit powder;
   (k) Prune powder;
   (l) Blackberry flavor;
   (m) Cherry flavor;
   (n) Grape flavor;
   (o) Loganberry flavor;
   (p) Pineapple flavor;
   (q) Raspberry flavor;
   (r) Strawberry flavor;
   (s) Synthetically produced ascorbic acid.

11. State how many milligrams of Vitamin C are contributed to a single 'Frutex' wafer by:

   (a) Rose Hips;
   (b) Acerola Berry;
   (c) Apple powder;
   (d) Lemon powder;
   (e) Orange powder;

(f) Apricot powder;
(g) Peach powder;
(h) Date powder;
(i) Fig powder;
(j) Grapefruit powder;
(k) Prune powder;
(l) Blackberry flavor;
(m) Cherry flavor;
(n) Grape flavor;
(o) Loganberry flavor;
(p) Pineapple flavor;
(q) Raspberry flavor;
(r) Strawberry flavor;
(s) Synthetically produced ascorbic acid.

12. If claimant contends that any amount of Vitamin C is contributed to the product by any ingredient not listed in Interrogatories 10 and 11 above, then list each such ingredient and state the amount of Vitamin C each is said to contribute to:

(a) a manufacturing batch of "Vital Foods Special Brand 'Frutex' Fruit Salad";
(b) a single 'Frutex' wafer.

13. Does claimant admit that "Vital Foods Special Brand 'Frutex' Fruit Salad" contains the following ingredients:

(a) Dextrose;
(b) Lactose;
(c) honey;
(d) citric acid;
(e) ascorbic acid;
(f) calcium stearate.

14. Does claimant admit that none of the ingredients listed in Interrogatory 13 are listed on the label of "Vital Foods Special Brand 'Frutex' Fruit Salad"?

15. If the answer to any part of Interrogatories 13 and 14 is anything other than an unqualified affirmative response, then state in detail what claimant contends the true facts to be and state the name, address and qualifications of each person having personal or expert knowledge of the truth of each of such facts.

16. Does claimant admit that synthetically produced ascorbic acid is a drug recognized in the Pharmacopeia of the United States, 16th Edition.
17. If the answer to Interrogatory 16 is anything other than an unqualified affirmative response, then state in detail what claimant contends the true facts to be and state the name, address, and qualifications of each person having personal or expert knowledge of the truth of each of such facts.
18. Exhibit C attached to the Government's interrogatories contains a reference to bioflavonoids. With respect to this, state:
    (a) whether a 'Frutex' wafer contains any bioflavonoids;
    (b) if so, the amount of bioflavonoids in each wafer and the source of such bioflavonoids, i.e., whether they are an added ingredient or are contributed in one or more of the fruit powder or fruit flavor ingredients;
    (c) if the bioflavonoids are said to be contributed by one or more of the fruit flavor or fruit powder ingredients, then state the name of each such ingredient.
19. During his lecture on March 31, 1960, Lelord Kordel referred to a study performed by a Dr. Lester Morrison. With reference to this study, state:
    (a) the date that such study began, and the date that it ended;
    (b) the exact number of subjects of the study;
    (c) the exact number of subjects in each group;
    (d) the "old standard medical treatment" given to each subject in the control group;
    (e) the complete qualitative and quantitative formula, including the exact dosage of choline, inositol, methionine, and/or lecithin, of each substance given to each subject in the treated group on each day of the test;
    (f) the nature of any standard therapy, such as bed rest, palliative therapy, morphine, hospital diet, and dicumarol, given to subjects in either the

treated or control group, and the differences, if any, in the standard therapy given to members of the two groups;

(g) the exact number of deaths which occurred in the treated group:

(1) at the end of one year;
(2) at the end of two years;

(h) the exact number of deaths which occurred in the control group:

(1) at the end of one year;
(2) at the end of two years.

20. Does claimant admit that the formula of "Korleen" is not the same qualitative and quantitative formula as that used by Dr. Morrison in the test referred to above.

21. Does claimant admit that a person taking "Korleen" as directed, two to four tablets daily, would consume no more than the following amounts of the ingredients listed:

(a) Choline—120-240 milligrams;
(b) Methionine—25-50 milligrams;
(c) Inositol—60-120 milligrams.

22. Does claimant admit:

(a) That the minimum daily dosage of choline administered by Dr. Morrison in the test referred to above was 6 grams (6000 milligrams);
(b) that the average daily dosage of choline administered by Dr. Morrison in the test was 12 grams (12,000 milligrams);
(c) that some subjects of the test received up to 32 grams (32,000 milligrams per day.)

23. Does claimant admit that Dr. Morrison's study showed that the higher the level of choline administered, the greater the effect produced.

24. Does claimant admit that in the study referred to above, Dr. Morrison did not administer inositol and methionine in combination with choline.

25. If the answer to any portion of Interrogatories 20, 21, 22, or 23 is anything other than an unqualified affirmative response, then state in detail what claimant contends the true facts to be and give the name and address of each person having personal knowledge of the truth of each of such facts.
26. Does claimant admit that the transcribed excerpts of Lelord Kordel's lectures in Detroit, Michigan from March 29, 1960 through April 8, 1960, which were furnished to claimant in response to claimant's Interrogatory 6(m) are true and accurate excerpts of these lectures.
27. If the answer to Interrogatory 26 is anything other than an unqualified affirmative response, then state in detail what claimant contends the true facts to be and give the name and address of each person having personal knowledge of the truth of each of such facts.
28. State whether or not claimant made or had made on its behalf a recording of Lelord Kordel's lectures at Detroit, Michigan, from March 29 through April 8, 1960. If so, then state:

    (a) the name and address of the person making the recording;
    (b) the name and address of the person having custody, possession or control of the recording;
    (c) the address at which the recording may be examined.

29. Exhibit B attached to the Government's Interrogatories contains a reference to "Helen, a 35-year-old married woman." With respect to this reference, state in detail:

    (a) the full name and present address of the woman;
    (b) the name and address of the hospital in which she was treated;
    (c) the name and address of each doctor who treated her, including the "special physician" referred to;
    (d) the exact amount of choline in the tablets with which she was treated, and the number of tablets which she took daily.

30. Exhibit B attached to the Government's Interrogatories contains a reference to "One 40-year-old woman (who) had been drinking a pint to a quart of hard liquor daily . . ." With respect to this reference, state in detail:

    (a) the full name and present address of the woman;
    (b) the name and address of each physician who treated her with choline;
    (c) the exact amount of choline ingested by the woman daily.

31. Exhibit B attached to the Government's Interrogatories contains excerpts from testimonials headed "Cramps of Varicose Veins Depart"; "After 25 Years—Varicose Veins Disappear"; and "Another Sufferer Helped." With respect to each of these testimonials state:

    (a) the name and present address of the writer of each of the testimonials;
    (b) the date each of the testimonials was received;
    (c) the name and address of the person having custody, possession or control of the testimonials;
    (d) the address at which the testimonials may be examined.

32. Exhibit C attached to the Government's Interrogatories contains excerpts from numerous testimonials. With respect to each testimonial represented therein, provide the information called for in Interrogatory 31.

33. (a) State whether claimant has received any testimonials from users of "Korleen" or "Vital Foods Special Brand 'Frutex' Fruit Salad" other than those inquired of in Interrogatories 29 through 32.

    (b) If the answer to part (a) above is affirmative, then for each such testimonial, provide the information called for in Interrogatory 31.

/s/ LAWRENCE GUBOW
United States Attorney

/s/ JEROME A. MOORE
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil No. 20215

UNITED STATES OF AMERICA

vs.

AN ARTICLE OF DRUG CONSISTING OF 39 CASES . . .
KORLEEN . . . "FRUTEX", etc.

PLEASE TAKE NOTICE that the claimant herein, DETROIT VITAL FOODS, INC., moves this Court for an order staying further proceedings herein or, in the alternative, for an order extending claimant's time to answer libelant's interrogatories until after the disposition of proceedings instituted against the claimant preliminary to criminal proceedings, upon the following grounds:

1. The proceedings, instituted pursuant to Section 305 of the Federal Food, Drug and Cosmetic Act (21 U.S.C. 335), involve the identical violations of the said Act as are involved herein, and the claimant herein is one of the parties named in the said proceeding.
2. The issues to be decided in the said proceeding under Section 305 will most likely be dispositive of the material issues involved in the instant proceeding.
3. This Court had discretion under Rule 33 of the Federal Rules of Civil Procedure to enter an order enlarging the time to respond to interrogatories for good cause shown.
4. A stay of the instant proceedings or enlargement of time to respond to the libelant's interrogatories should be granted in the interest of substantial justice.

This motion is and will be based upon (a) the annexed affidavit of Milton A. Bass, sworn to the 4th day of April, 1961; (b) the pleadings herein and all applicable

statutory provisions; and (c) the memorandum of law to be submitted in support hereof.

BASS & FRIEND
Attorneys for Claimant
342 Madison Avenue
New York 17, N.Y.

ALLAN D. BEHRENDT
Attorney for Claimant
Penobscot Building
Detroit 26, Michigan

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA

vs.

AN ARTICLE OF DRUG CONSISTING OF 39 CASES . . .
KORLEEN . . . "FRUTEX", etc.

State of New York)
County of New York) ss.:

MILTON A. BASS, being duly sworn, deposes and says:

I am a member of the firm of BASS & FRIEND, counsel for the claimant herein. I submit this affidavit in support of the annexed motion for a stay of the instant proceedings or, in the alternative, to enlarge the time of claimant to respond to the libelant's interrogatories until after the disposition of related proceedings instituted by the Government under Section 305 of the Federal Food, Drug and Cosmetic Act.

This is a libel action commenced by the Government to condemn quantities of "Michigan Brand Korleen Tablets", "Lelord Kordel's Frutex Fruit Salad Natural Organic Vitamin C" and "Vital Foods Special Brand Frutex Fruit Salad Natural Organic Vitamin C", on the ground that the said articles were misbranded while held for sale after shipment in interstate commerce within the purview of Section 304 of the Federal Food, Drug and Cosmetic Act (21 U.S.C. 334). The action was commenced by the service of a libel of information on June 9, 1960. Subsequent thereto, Detroit Vital Foods, Inc. appeared as claimant herein and filed its answer to the libel of information in substance denying that the articles are misbranded, and denying that the literature and books accompanied the said articles as labeling within the meaning of the said Act.

On or about December 23, 1960 the claimant herein served written interrogatories upon the libelant seeking

information as to the issues framed by the pleadings herein. On or about January 19, 1961 libelant served answers to the said written interrogatories.

On January 9, 1961 the libelant served written interrogatories upon the claimant. The original of the said interrogatories are on file with the court and are respectfully incorporated herein by reference and made a part hereof.

The said libelant's interrogatories, while containing 65 separately numbered questions, in reality, with their numerous subdivisions, comprise more than 1,000 separate and distinct questions requesting information as to every conceivable detail of the claimant's business, including a series of interrogatories numbered 8, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 25, 26, 27, 30, 32, 35, 38, 44, 45, 47, 48, 50, 52, 53, 54 and 60 which in substance and effect request the claimant to admit facts and relate information which may prove the Government's allegations that the said articles being proceeded against are misbranded in violation of the Federal Food, Drug and Cosmetic Act.

On January 23, 1961, the libel of information was amended in respects not herein material, so as to include certain additional charges of misbranding with respect to the Michigan Brand Korleen Tablets. However, no additional interrogatories had been served with respect to these allegations.

Almost simultaneously with the service of the Government's interrogatories as aforesaid, and on or about January 19, 1961, the Government instituted a proceeding against the claimant herein and two of its officers, to wit, Lelord Kordel and Alfred J. Feldten under Section 305 of the Federal Food, Drug and Cosmetic Act (21 U.S.C. 335). Under Section 303 of the Act, before criminal proceedings are instituted for an alleged violation of the Act, the Administrator of the Food and Drug Act is required to give appropriate notice and opportunity to present views to the person against whom such criminal proceedings may be commenced. In accordance with Section 303, a notice of hearing was served upon the claimant together with a description of the charges specifying the respects

in which it was claimed that the Act was violated. A copy of the said notice of hearing and specification of charges are attached hereto as Exhibit A and made a part hereof. The specification of charges against claimant contains seven alleged acts of misbranding, three of which are identical to the allegations involved in the instant condemnation action. The charges 21-132R and 21-145/6E allege that "Lelord Kordel's Frutex Fruit Salad Natural Organic Vitam C Wafers" and "Vital Foods Special Brand Frutex Fruit Salad Natural Organic Vitamin C Wafers" were shipped by Savoy Drug and Chemical Co., Chicago, Illinois, to Detroit Vital Foods, Inc., Detroit, Michigan, on or about January 12, 1960, March 4, 1960, March 25, 1960 and March 28, 1960, and that the said articles are misbranded because their labeling, namely, the leaflets entitled "Is This A New Way To Strengthen Your Heart?", "Some Interesting Testimonials from Enthusiastic Followers" and "Special Lecture Prices" and books entitled "Eat and Grow Younger" and "How To Make People Like You" is false and misleading in that they contain statements which represent and suggest that the said articles are adequate and effective treatments for various conditions and purposes, whereas the said articles are not adequate and effective treatment for such conditions and purposes. It was further charged that the articles were misbranded in that the labeling failed to contain adequate directions for use for the treatment and prevention of certain diseases, symptoms and conditions for which the articles were held out during a series of lectures given by Lelord Kordel at the Masonic Temple and Fort Wayne Hotel, Detroit, Michigan, during the period March 29, 1960 through April 8, 1960.

Charge 21-133R, 21-144R of the Section 305 proceeding as aforesaid alleges that "Michigan Brand Korleen Tablets" were shipped by Freshman Vitamin Company, Oak Park, Michigan, to Detroit Vital Foods, Inc., Detroit, Michigan, on or about March 1st, 1960 after having been manufactured from active raw ingredients received in interstate commerce and that the said articles are misbranded in that its labeling, namely, the aforementioned leaflets and books contain false and misleading state-

ments which represent and suggest that the article is an adequate and effective treatment for certain conditions and purposes, whereas the said article is not an adequate and effective treatment for such conditions and purposes. It is further alleged that the said article is misbranded in that its labeling does not contain adequate directions for use for the treatment of certain symptoms and conditions for which the article was held out during a series of lectures given by Lelord Kordel at the Masonic Temple and Fort Wayne Hotel, Detroit, Michigan, during the period March 29, 1960 through April 8, 1960.

An examination of the notice of hearing and charge sheet in respect to the Lelord Kordel Frutex Fruit Salad, Vital Foods Special Brand Frutex Fruit Salad and the Michigan Brand Korleen Tablets shows that the alleged violations of the Federal Food, Drug and Cosmetic Act are identical with the alleged violations of the said Act contained in the instant Libel of Information. (See Libel of Information, paragraphs 2, 3, 4 and 5). The dates of shipment of the various articles, the consignors and consignees of the said shipments and the literature and sets of Lelord Kordel which it is claimed misbrand the said articles, are identical. Both proceedings allege violations of the same sections, i.e., 21 U.S.C. 352A, and 21 U.S.C. 352(f)(1). In short, both proceedings seek to redress the identical alleged violations and are premised upon the identical facts.

It is respectfully submitted that under such circumstances and for the reasons set forth in claimant's memorandum of law to be submitted in support of the instant motion, that the instant action should be stayed, or, in the alternative, the claimant's time to respond to the libelant's interrogatories should be enlarged until after the disposition of the above mentioned Section 305 proceedings. Clearly, any attempt by the Government to explore and canvas in the criminal proceeding, the matters which it seeks here, would be improper. To permit the Government to obtain such information by resort to the discovery procedures of the Federal Rules of Civil Procedure would work a grave injustice against the claimant. Moreover, the issues to be decided in the said crim-

inal proceedings will almost certainly dispose of the major issues involved in the case at bar. The elements of proof in a federal and criminal proceeding under the Federal Food, Drug and Cosmetic Act are identical. The language of the statutes violated are identical. The facts of interstate commerce and the acts which gave rise to the alleged misbranding are identical. The alleged labeling material which it is claimed is false and misleading, is identical and the speeches of Lelord Kordel which it is claimed misbranded the articles, are identical. If a criminal proceeding is commenced against the claimant and is determined in favor of the Government, it will be an absolute bar against the claimant herein with respect to the same issues involved. If, on the other hand, such a proceeding terminates in favor of the claimant, even if not an absolute bar in favor of the claimant in this action, it would at least be an estoppel as to the controlling issues involved. Clearly, no matter what the outcome of the criminal proceeding may be, issues involving the crux and core of this action will of necessity be determined in that proceeding.

In terms of a balancing of hardship and equities of the respective parties herein, it is respectfully submitted that a stay of the action or an enlargement of the claimant's time to respond to libelant's interrogatories will work a lesser hardship upon the libelant herein than would a denial of such relief work upon the claimant. The failure to furnish the information sought at this particular time while claimant is confronted with a contemplated criminal proceeding will not necessarily deprive the libelant of its right to discovery. The posture of the instant action is not such on the calendar of this Court that trial is imminent. So long as libelant is given adequate opportunity to prepare its action herein prior to the time that actual trial hereof is scheduled, libelant cannot possibly be harmed. By that time it may very well be that the related proceeding herein will be determined. On the other hand, to require a disclosure of the information requested in the libelant's interrogatories could very well provide libelant with information to assist it in sustaining its allegations of criminal violations of the Act and also re-

veal claimant's evidence in defense thereof. There is not here involved an issue of a self-incrimination privilege in favor of the claimant corporation. Rather, it would appear that upon an evaluation of all of the various factors involved herein, substantial justice and discretion dictate that the instant action be stayed until the final disposition of the related proceeding or, in the alternative, that the claimant's time to respond to the Government's interrogatories be postponed until after the final disposition of the said proceeding.

WHEREFORE, it is respectfully submitted that the annexed motion should be granted.

.....

Milton A. Bass

Sworn to before me this 4th day of April, 1961.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 20215

UNITED STATES OF AMERICA

vs.

An article of drug consisting of 39 cases, more or less, each containing 48 60-tablet bottles, and 1 case containing 24 60-tablet bottles, more or less, labeled in part:

(bottle)

"Mich. Brand Korleen Tablets Contains: Choline Citrate, Inositol, Methionine, Cysteine, Niacinamide, Thiamin (Vitamin B1) with excipients. 60 tablets * * * Lelord Kordel of Michigan, Detroit * * * 6009" etc.

MEMORANDUM AND ORDER DENYING MOTION TO STAY FURTHER PROCEEDINGS AND MOTION EXTENDING CLAIMANT'S TIME TO ANSWER LIBELANT'S INTERROGATORIES

At a session of said Court held in the Federal Building, in the City of Detroit, Michigan, this ..... of ....., 1961

Present: HONORABLE THEODORE LEVIN

Chief United States District Judge

This is a civil *in rem* action commenced by the Government under the provisions of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C.A. § 301 *et seq.*

The claimant by this motion requests either a stay of further proceedings in this action or an order extending the claimant's time to answer the libelant's interrogatories.

This action was commenced by the service of a libel of information on June 9, 1960. On December 23, 1960, the claimant served written interrogatories upon the li-

belant, which were answered on January 19, 1961. On January 9, 1961. On January 9, 1961, the libelant served written interrogatories upon the claimant. On January 19, 1961, the Government issued a "Notice of Hearing" to Detroit Foods, Inc., Lelord Kordel, and Alfred J. Feldten. The Notice stated that an investigation of the Department of Health, Education and Welfare indicated ". . . your responsibility for violation of the Federal Food, Drug, and Cosmetic Act, as described in the attached charge sheet, . . ." Several of the articles listed in the Notice are identical with those seized in this action. The Notice was issued in accordance with Section 305 of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C.A. § 335, which declares that, before any violation of the Act is reported to any United States Attorney for institution of criminal proceedings, the person against whom the proceeding is contemplated is to be given appropriate notice and opportunity to present his views.

In this motion, the claimant concedes that a corporation cannot invoke the privilege of self-incrimination under the Fifth Amendment. *United States* v. *3963 Bottles* . . . "Enerjel," 265 F.(2d) 332 (7th Cir. 1959), cert. den. 360 U.S. 931 (1959), and *United States* v. *42 Jars* . . . *"Bee Royale Capsules,"* 264 F.(2d) 666 (3rd Cir. 1959). However, the claimant asks this Court to utilize its discretionary power under Rule 33 of the Federal Rules of Civil Procedure to enlarge the time for submission of answers to interrogatories until after the disposition of the "contemplated" criminal proceeding. The claimant argues that "good cause" exists in this action because the Government, through the answers to the interrogatories, will be able to obtain information which is not available for the "threatened" criminal prosecution under the limited discovery practices of the Federal Rules of Criminal Procedure.

The claimant has failed to indicate that substantial prejudice and harm will result by requiring it to respond to the libelant's interrogatories at this time. The Assistant United States Attorney indicated during oral argument in court that, from his experience, a period of six

months to one year elapses from the time the Notice of Hearing under Section 305 is given until a criminal prosecution is initiated. Furthermore, Section 305 is merely a preliminary step in formal compliance with the statutory provision and does not conclusively indicate that a criminal proceeding will in fact be instituted.

The Government could obtain data for a criminal prosecution from the testimony elicited during the trial in this civil action or through subpoenaing books and records of the claimant. Therefore, it does not seem to be in the interests of justice to deny such information to the Government because it seeks it by way of the discovery procedures.

The motion to stay proceedings or to extend time to answer the Government's interrogatories is denied. The claimant shall have thirty days to answer the interrogatories submitted on January 9, 1961, or may within twenty days file appropriate objections.

THEODORE LEVIN
Chief United States District Judge

A True Copy John J. Ginther, Clerk By .....
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 20215

Filed U.S. District Court East Dist. Mich.
1961 Sep 14 pm 2:54 John J. Ginther Clerk

UNITED STATES OF AMERICA

vs.

AN ARTICLE OF DRUG . . . "MICHIGAN BRAND KORLEEN TABLETS" . . . etc.

OBJECTIONS TO LIBELANT'S INTERROGATORIES

Claimant herein objects to certain of libelant's interrogatories and libelant's additional written interrogatories, on the grounds stated.

Libelant's Written Interrogatories

1. Interrogatories 16 (b) and (c), 32, 44 and 50. Each of these interrogatories request information concerning the alleged representations made in Exhibits A, B, C and D and on the label of Vital Foods Special Brand Frutex Fruit Salad. The law is settled that questions pertaining to whether or not certain representations are made by the printed matter in question are improper since the literature speaks for itself. Moreover, interrogatory 16 (b) and (c) is improper in that it fails to identify the specific representations made in Exhibits A, B, C and D concerning which the information is sought. *United States* v. *48 Jars Tranquillease*, 23 F.R.D. 192; *United States* v. *40 Cartons Fairfax Cigarettes*, 113 F. Supp. 336.

2. Interrogatories 18, 26, 35, 52 and 57 are improper in that they call for admissions that claimant may have violated the Federal Food, Drug and Cosmetic Act. These interrogatories are framed in a manner designed to exact an admission from claimant that the products are

represented as being adequate and effective treatments for certain conditions and that in truth and in fact they are not adequate and effective treatments for such conditions. The questions therefore attempt to shift to the claimant the burden of preparing and proving the Government's case. This is clearly improper in a federal regulatory proceeding under the decision in *Porter* v. *Montaldo's*, 71 F. Supp. 372.

3. Interrogatories 20, 21, 22 and 23 are improper in that they call for conclusions as to what may have been said at the lectures referred to. In any event, it would appear that the information requested is already in libelant's possession, since libelant has appended to its answers to claimant's interrogatories verbatim excerpts from Kordel's lectures which libelant has transcribed.

4. Interrogatory 27 is improper in that it presupposes that Korleen has been sold to diagnose and treat the diseases and conditions referred to. As such, the question is "loaded". Moreover, the question is improper as calling for expert opinion as to the medical causes of various diseases and conditions, which information should more properly be obtained from experts. To answer the question would require claimant to review hundreds of textbooks and scientific material. The interrogatory, therefore, is objectionable on several grounds.

a) Similar interrogatories were stricken in *United States* v. *Wilson Williams, Inc.*, 24 F.R.D. 468.

b) The question requires claimant to perform burdensome labors for the libelant in compiling medical data which is already available to the libelant or readily obtainable in its own research libraries. Claimant is not required to undertake independent research to frame an answer. *Klein* v. *Leader*, 81 F. Supp. 624; *United States* v. *5 Cases*, reported in Kleinfeld & Dunn, Federal Food, Drug and Cosmetic Act 1938-1939 (CCH page 421); *Wright* v. *R & L Market*, 9 F.R.D. 559.

5. Interrogatory 30 is improper because it presupposes that the product is sold for the diseases and conditions referred to and as such the question is "loaded". Also, the question calls for an admission that the labeling is

improper and violative of the Federal Food, Drug and Cosmetic Act, and as such the question is improper under the authority of *Porter* v. *Montaldo's, supra.*

6. Interrogatories 34 and 59 are improper as calling for expert opinion as to the medical causes of various diseases and conditions, which information should more properly be obtained from experts. To answer these questions would require claimant to review hundreds of textbooks and scientific material. The interrogatories, therefore, are objectionable on several grounds.

a) Similar interrogatories were stricken in *United States* v. *Wilson Williams, Inc.*, 24 F.R.D. 468.

b) The interrogatories require claimant to perform burdensome labors for the libelant in compiling medical data which is already available to the libelant or readily obtainable in its own research libraries. Claimant is not required to undertake independent research to frame an answer. *Klein* v. *Leader*, 81 F. Supp. 624; *United States* v. *5 Cases*, reported in Kleinfeld & Dunn, Federal Food, Drug and Cosmetic Act 1938-1939 (CCH page 421); *Wright* v. *R & L Market*, 9 F.R.D. 559.

7. Interrogatory 37 is improper in that it presupposes that claimant has represented the product as a treatment for the conditions listed. As such, the question is "loaded". Moreover, it asks claimant to determine the state of mind of personnel of hospitals or medical facilities that may have used Korleen.

8. Interrogatory 60 is improper in that it presupposes that the product is sold for the conditions and diseases referred to and as such the question is "loaded". Moreover, the question asks the claimant to admit a possible violation of the Federal Food, Drug and Cosmetic Act and is therefore improper under the holding of *Porter* v. *Mondaldo's, supra.*

Libelant's Additional Written Interrogatories

9. Interrogatory 14 of libelant's additional written interrogatories is improper in that the label speaks for itself and questions concerning the contents of the printed material are improper. See decisions cited in "1" above.

10. Interrogatory 16 of libelant's additional written interrogatories is improper as calling for an admission as to a matter contained in the U. S. Pharmacopeia 16th Edition. Claimant should not be asked to draw a conclusion as to what is contained in the U. S. Pharmacopeia and as to what it may or may not mean.

11. Interrogatory 19 of libelant's additional written interrogatories is improper in that it asks claimant to admit the premise of the question, namely that Kordel spoke of studies performed by Dr. Lester Morrison during the former's lecture on March 31, 1960. As such, it is improper under the authority of *Porter* v. *Montaldo's, supra.* Moreover, it would appear that the information called for is already in the possession of libelant. See, for example, interrogatory 22 (a), (b) and (c) containing detailed information as to Dr. Morrison's study. See also libelant's answers to claimant's interrogatories wherein it appears that the information requested of claimant herein is already in the possession of libelant. The interrogatory therefore serves no purpose except to exact a possibly incriminating admission from claimant and to shift to claimant the burden of proving the Government's case.

12. Interrogatory 20 of libelant's additional written interrogatories is improper, for the same reasons stated in "11" above.

/s/ Bass & Friend
Bass & Friend
Attorneys for Claimant
342 Madison Avenue
New York 17, N. Y.

Date: July 20, 1961

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 20215

UNITED STATES OF AMERICA, LIBELANT,

vs.

AN ARTICLE OF DRUG . . . "MICHIGAN BRAND KORLEEN TABLETS" . . . ETC., CLAIMANT.

MEMORANDUM AND ORDER

The court has considered the interrogatories of the United States of America, the libelant, and the objections to such interrogatories made by the claimant.

IT IS HEREBY ORDERED that within fifteen (15) days from the date hereof the claimant shall respond in writing to libelant's interrogatories 18, 20, 21, 22, 23, 26, 30, 35, 52, 57, and 60.

FURTHER, the claimant is ordered within fifteen (15) days from the date hereof to make response to additional written interrogatories of the libelant, numbered from 2 to 12 inclusive and from 29 to 33 inclusive.

FURTHER, upon failure of the claimant to file responses to such interrogatories as here directed, judgment will be entered for the libelant as prayed for in the complaint.

The trial in this case has been set, as the parties have already been notified, for October 23, 1962, at 10:00 A.M.

.....

THEODORE LEVIN
Chief United States District Judge

Dated: Detroit, Michigan
September 13, 1962.

A True Copy John J. Ginther, Clerk By .....
Deputy Clerk

ANSWERS TO LIBELANT'S INTERROGATORIES

(Companion Civil Case No. 20215)

Claimant submits the following answers to libelant's written interrogatories and additional written interrogatories.

1. (a) Yes.
   (b) (1) and (5) Yes
   (2), (3), (4) and (6) No.

2. The names mentioned in 1. (b) (2), (3), (4) and (6) are not used by claimant corporation. Alfred Feldten, 20731 Seven Mile Road, Detroit, Michigan.

3. Yes.

4. Not applicable.

5. Yes.

6. Not applicable.

7. No.

8. No.

9. Korleen is intended to be used as a food supplement.

10. No. Claimant admits that Exhibit A appeared in the March 28, 1960 edition of Detroit News, but said advertisement was not placed in behalf of claimant.

11. Yes.

12. Claimant has no knowledge of the information requested.

13. Claimant has no knowledge of the information requested.

14. Claimant has no knowledge of the information requested.

15. Not applicable.

16. (a) Claimant does not know who drafted or approved the draft of the exhibits.

17. Claimant has no present recollection. The information is being checked and upon ascertainment of the information, it will be submitted to the libelant.

19. Not applicable.

24. Not applicable because of objections to prior interrogatories.

25. Obviously, a physician and not a lay person has the professional training and experience to diagnose and treat diseases and conditions. This is not to say, however, that lay persons do not frequently correctly diagnose their own conditions and do not frequently properly treat themselves for such conditions.

28. Claimant is in the business of supplying foods and food supplements to all who wish to purchase them. Korleen is sold as a food supplement and not as a cure or treatment for the disease and conditions mentioned.

29. Not applicable.

31. Not applicable by reason of objection to prior interrogatory.

33. Inapplicable by reason of objection to prior interrogatory.

36. Inapplicable by reason of objection to prior interrogatory.

38. As to the leaflets, yes. As to the books, no.

39. The books contain no statements relating to Korleen and the Frutex Fruit Salad.

40. Yes.

41. Yes.

42. Not applicable.

43. Yes.

45. No such representation is made.

46. Frutex is a food supplement of vitamin C in a flavored base consisting of natural fruit powders and flavors. Alfred Feldton.

46. (d) None.

47. No.

48. (a), (b), (c) and (d) No.

49. See 46.

51. Inapplicable by reason of objection to prior interrogatory.

53. Inapplicable by reason of objection to prior interrogatory.

54. No.

55. According to claimant's best information, Vital Foods Special Brand Frutex was not offered for sale at the lectures referred to.

56. See 25.

58. See 46.

61. Inapplicable by reason of objection to prior interrogatory.

62. (a) through (h) Yes.

63. Inapplicable.

64. Kordel is president of claimant and employed by it.

65. No decision has as yet been made.

Additional Written Interrogatories

1. (a) Savoy Drug and Chemical Co., 16 South Peoria Street, Chicago, Illinois.

(b) See 1. (a). Vital Foods Frutex has never been packed in bottles of 30 wafers each.

(c) Information is not presently available and in any event it would appear to be immaterial, since claimant has conceded that the article contains the label referred to.

2. through 12. The information requested is being obtained and will be submitted shortly.

13. Yes, as excipients and fillers.

15. Inapplicable by reason of objection to prior interrogatory.

17. Inapplicable by reason of objection to prior interrogatory.

18. Yes, as naturally present in some of the ingredients.

21. Yes.

23. Claimant does not have the information.

24. Claimant does not have the information.

25. Not applicable.

26. Claimant does not presently have the information sought.

27. Not applicable.

28. No, since claimant has no direct connection with the lectures referred to.

29. through 33. The information is being obtained and will be submitted shortly.

STATE OF MICHIGAN)
) ss.:
COUNTY OF WAYNE)

Alfred Feldton, being duly sworn, deposes and says that he is Vice President of the claimant herein; that the answers to the interrogatories are to his best knowledge and belief true, although the truth of all the said answers is not known to him personally.

/s/ ALFRED FELDTON

Sworn to before me this
day of July, 1961.

_____

SUPPLEMENTAL ANSWERS TO LIBELANT'S INTERROGATORIES

(Companion Civil Case No. 20215)

Claimant submits the following supplemental answers to libelant's written interrogatories and additional written interrogatories.

18. No.

20. Yes.

21. Yes, except "no" to that part of the interrogatory which refers to whether Kordel stated that the basic book was recommended to be used by persons who wished to follow his program.

22. (a) Yes.
(b) Yes.

23. (a) and (b) No.

26. No.

30, 60. No and by way of further response alleges that no representations have been made, orally or otherwise, that an individual may himself diagnose these conditions or changes therein.

35. No.

52, 57. No and further alleges that products were not represented for such conditions.

Answers to Additional Interrogatories

2-12. Claimant since July, 1961, has made several requests of Savoy Drug and Chemical Co., the manufacturer of the product for the information requested in 2-12. The information has not been supplied and consequently claimant is unable to respond to the specific questions asked. However, claimant submits such information as is available to it, based on its own knowledge of the product.

2. A quantitative analysis is not available—and, therefore, claimant cannot give a breakdown by weight of each ingredient. However, the total composition of the wafer, which weighs approximately 12 to 15 grains—consists of 100 milligrams of organic Vitamin C (also known as ascorbic acid) in a base consisting of the fol-

lowing natural materials furnishing their naturally present amounts of Vitamin C, Bioflavonoids and other substances that may naturally occur in these natural powders and flavors:

Rose Hips, Acerola berry, Apple, Lemon, Orange, Apricot, Peach, Date, Fig, Grapefruit, Prune, Blackberry, Cherry, Grape, Loganberry, Pineapple, Raspberry, Strawberry. These materials are held together in a base of Dextrose which is a fruit sugar the same type of sugar as found in grapes and other fruits.

3. Claimant does not have this information but it appears that it is partly answered by question number 2.

4. Claimant does not have this exact information but presumes that a manufacturing batch is in the neighborhood of 100,000 wafers more or less.

5. The average weight per wafer is approximately 12 to 15 grains as stated above.

6. The breakdown as requested is not available.

7. Claimant is unable to answer this question specifically. However, claimant states that the amount of naturally occurring nutrients in the natural and organic fruit powders and flavors would depend upon the amount naturally inherent, which of course varies with the season and location and process of producing these concentrates. Only the organic Vitamin C (ascorbic acid) is introduced in measured amounts of 100 milligrams per wafer. The amount of natural nutrients present in the concentrates would be a bonus to the declared amount of Vitamin C.

8. This information is not available as specifically asked—but it is believed that the answer to 7 more or less covers the ground that question number 8 is attempting to traverse. As already stated, claimant does not know what percentage of the total weight of the product each ingredient contributes nutrients—it is considered as a whole with the exception of the organic Vitamin C (ascorbic acid).

9. (a) A manufacturing batch of Vital Foods Fruit Salad Frutex would contain the amount of 100 milligrams per tablet of organic Vitamin C (ascorbic acid) multiplied by the number of wafers the manufacturing batch would yield. It would also contain the naturally

inherent and therefore supporting amounts of Vitamin C, Bioflavonoids and other nutrients that would be present in the fruit concentrates.

(9). (b) A single Frutex wafer would furnish a guaranteed amount of 100 milligrams of organic Vitamin C (ascorbic acid) in addition to the supplementary amounts furnished by the fruit concentrates.

10, 11. Information not available except as maybe stated above. In addition, in view of the fact that the organic Vitamin C (ascorbic acid) is present in measured amounts the fruit concentrates, flavors and powders, must be considered as supporting quantities on which no guarantee of exact quantities was made other than the natural inherent properties and therefore it was not stated on the label as it was unnecessary to do so.

12. No additional information available, except as above stated.

29. This information is not available. The article in question appeared as a news report and factual story in the popular press, the source of which is now forgotten.

30. See 29.

31. This information is not available.

32. This information is not available.

33. Claimant has received scores of various testimonials on the various products handled by it—including but not limited to Korleen and Vital Foods special brand Frutex Fruit Salad. These testimonials were not retained and are therefore not available. In addition, numerous testimonials received were of a verbal nature, given to clerks at the stores.

STATE OF MICHIGAN)
) ss.:
COUNTY OF WAYNE)

ALFRED FELDTEN, being duly sworn, deposes and says that he is Vice President of the claimant herein; that the answers to the interrogatories are to his best knowledge and belief true, although the truth of all the said answers is not known to him personally.

/s/ ALFRED FELDTEN
ALFRED FELDTEN

Sworn to before me this
24th day of September, 1962.

/s/ VICTOR H. LOOK
VICTOR H. LOOK
Notary Public, St. Clair County, Mich.
My Commission Expires June 6, 1965
Acting in Wayne County

OPINION OF UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Decided July 26, 1968.

Before: O'SULLIVAN and COMBS, Circuit Judges, and CECIL, Senior Circuit Judge.

COMBS, Circuit Judge. The defendants were found guilty by a jury on five counts of an indictment charging them with introduction into interstate commerce of misbranded drugs and with causing a drug to be misbranded after it had been shipped in interstate commerce. 21 U.S.C. § 331(a) and (k). The defendant Kordel was sentenced to two years imprisonment and to a fine of $10,000.00. The defendant Feldten was sentenced to one year imprisonment, suspended to thirty days with three years probation, and to a fine of $2,000.00. A total fine of $10,000.00 was imposed upon the corporate defendant.

Detroit Vital Foods, Inc., is a Michigan corporation with headquarters in Detroit. The defendants Kordel and Feldten were its president and vice president, respectively. During 1959, 1960, and 1961, Kordel traveled across the country delivering a series of lectures in different cities. Advertisement of the lectures preceded his appearance and the public was invited to attend. The meetings were held in public halls or auditoriums leased for the occasion by the defendants. Sales booths were established in or near the lecture halls where the audience could purchase the company's products Aminex, Frutex, Nutri-Time, Korleen, and other products not here in question, usually at special introductory prices. The company's products were sold not only at the lectures but were generally available in health food stores. Each package had a label attached which described the contents and gave directions for use.

Kordel was the author of numerous books and leaflets, such as "Eat and Grow Younger", "How to Make People Like You", "Health Through Nutrition", and "Is This a New Way to Strengthen Your Heart?"

The books and lectures were discussions of how various physical ailments could be alleviated by the intake of cer-

tain foods and food elements. The best source of these foods and food elements, it was said, were the products offered for sale by the defendants. Leaflets distributed to the lecture audiences were to the effect that the statements made were the personal opinion of the speaker and author and that a physician should be consulted in regard to specific diseases.

Feldten made no speeches but acted as Kordel's assistant. He sold the products at lectures and took orders for products to be shipped from Detroit.

Kordel in his lectures and published material advertised some products by name. In other instances, he merely related certain chemicals or food elements to the improvement of various physical ailments and recommended the company's products as the best source. For example:

> A combination of chlorine, methionine, and inositol —exactly the ingredients of Korleen—is a successful treatment for cirrhosis of the liver.
>
> Varicose veins existing for twenty-five years were cured in three months with the intake of three Korleen tablets per day.
>
> People may "protect" their bodies from headaches, colds, stiff ankles, poor circulation, gas, constipation, and poor digestion by partaking of a concentrated source of seventy-two different vitamins, minerals, and nutrients—coincidentally, the product which contains all those ingredients is Nutri-Time.
>
> Vitamin C is a preventive and cure for bleeding gums, sore throat, earache, swollen neck glands, pneumonia, and acute rheumatism—the best source of Vitamin C is Frutex.
>
> Protein helps form antibodies to fight infection and is the first line of defense; it is most efficiently assimilated within the body when introduced in the form of a concentrated protein tablet—the recommended source is Super Protein Aminex which has a high concentrate of protein and all animal acids in the proper balance.

Kordel occasionally stated that his remarks had no relation to drugs, that he spoke only of natural nutrients used as food supplements.

Several grounds of assigned error were argued in briefs but we consider it necessary to discuss only one. We hold that the judgments must be reversed because defendants were compelled to give testimony against themselves in violation of the Fifth Amendment to the United States Constitution.

While defendants were under investigation for possible criminal violation of the Food, Drug and Cosmetic Act, the Government instituted a civil action against Detroit Vital Foods, Inc., to condemn certain quantities of their products Korleen and Frutex, asserting that these articles were misbranded. In the civil action the defendants were served with extensive written interrogatories seeking comprehensive and detailed information about the corporate defendant and the activities of the individual defendants in connection with the company's business. Before these interrogatories were answer defendants were notified that the Government contemplated taking criminal action against them because of their activities in connection with Korleen and Frutex.

The defendants filed objections to being required to answer the interrogatories and moved to stay the civil proceedings pending outcome of the contemplated criminal action. The objections and motion were denied by the Honorable Theodore Levin, United States District Judge for the Eastern District of Michigan, who reasoned that the defendants would not necessarily be prejudiced since there was no certainty when, or if, a criminal action would be brought. The defendants then filed answers to the interrogatories pursuant to Judge Levin's order. Much of the information supplied by the defendants in answer to the interrogatories was necessary to the Government's case in the criminal prosecution.

Prior to the trial of this action, the defendants moved to quash the indictment and to suppress all evidence and leads obtained by the Government in the civil action. The trial judge, Honorable Ralph M. Freeman, granted a hearing on the motions and thereafter denied them. It was developed at the hearing that the civil case and the investigation of the criminal case went forward on a common front. Information obtained in the civil case was

transmitted to those in charge of the criminal investigation, and recommendation for criminal prosecution was not made until after Judge Levin had ordered the interrogatories to be answered in the civil case. The interrogatories were prepared by Mr. Randolph of the Food and Drug Administration in Washington, who made the initial decision to recommend criminal action against the defendants. The answers to the interrogatories were sent to Mr. Randolph and the indictment was prepared in Randolph's office.

In no sense was the action of the defendants in answering the interrogatories voluntary. When ordered to do so after their objections had been overruled, they had three possible courses available to them. They could still have refused to answer. This almost certainly would have resulted in the forefeiture of their property which had been seized by the Government. They could have given false answers to the interrogatories. This would have subjected them to possible prosecution for perjury. Their third course was to supply the required information, thereby possibly incriminating themselves in the contemplated criminal action. In choosing the third course defendants supplied the Government with evidence and leads helpful in securing their indictment and subsequent conviction. Their choice was a hard one and the specific question is whether they could be required to make a choice. We think not. A person may not be required to supply information which might possibly incriminate him upon penalty of suffering a forfeiture of his property. This is a "compelling" which is prohibited by the Fifth Amendment. The early case of *Boyd* v. *United States*, 116 U. S. 616 (1886), is in point.

Boyd was a civil action to seize goods allegedly imported without the payment of customs duties. The Government attempted to subpoena invoices which were in the possession of the defendants. The Supreme Court, regarding the action as having a "quasi-criminal" nature, denied the Government's right to subpoena the invoices, holding that

> "[A] compulsory production of the private books and papers of the owners of goods sought to be forfeited

> in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment." 116 U.S. at 634, 635.

The same principle was involved in *Garrity* v. *New Jersey*, 385 U.S. 493 (1967). There, certain policemen had been convicted of a conspiracy to obstruct the administration of the New Jersey traffic laws. The policemen appealed on the ground that statements obtained in violation of their privilege against self-incrimination were used as evidence to convict them. The incriminatory statements were obtained during an investigation by the New Jersey Attorney General into the fixing of traffic tickets. The policemen were questioned during this investigation, after being informed of their privilege against self-incrimination but were warned that if they refused to answer they could be removed from their jobs.

They answered the questions, and their answers were later used to convict them. The Supreme Court reversed the convictions, saying:

> "The choice given the petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or remain silent. That practice, like interrogation practices we reviewed in *Miranda* v. *Arizona*, 384 U.S. 436, 464-465, is 'likely to exert such pressure upon an individual as to disable him from making a free and rational choice.' We think the statements were infected by the coercion inherent in this scheme of questioning and cannot be sustained as voluntary under our prior decisions." 385 U.S. at 497, 498.

It has consistently been held that a penalty may not be placed upon one for exercising his privilege against self-incrimination. *Spevack* v. *Klein*, 385 U.S. 511 (1967), and *Slochower* v. *Board of Education*, 350 U.S. 551 (1956). Also see *United States* v. *Parrott*, 248 F.Supp.

196 (D.D.C. 1965); *United States* v. *Thayer*, 214 F.Supp. 929 (DC Colo. 1963); *Lord* v. *Kelley*, 233 F.Supp. 684 (DC Mass. 1963); *United States* v. *Lipshitz*, 132 F.Supp. 519 (E.D.N.Y. 1955); and *United States* v. *Guerrina*, 112 F. Supp. 126 (E.D. Pa. 1953).

At the hearing held by Judge Freeman evidence was heard on the issue of the Government's good faith in bringing the civil action. Judge Freeman concluded that the civil action was brought in good faith and was not a subterfuge to obtain evidence for a criminal prosecution. He held therefore that the evidence was not tainted, relying on *Abel* v. *United States*, 362 U.S. 217 (1960).

Abel is not controlling here. That case involved a search and seizure issue; compulsory self-incrimination was not involved. The civil and criminal charges in *Abel* were only remotely related and it was by chance that evidence helpful in a criminal prosecution was obtained in the search. Moreover, the limits of the search were much more restricted than is the scope of permissible inquiry in civil interrogatories. In *Abel* it was conceded that the questioned evidence was obtained during a legal search of the defendant's hotel room after he was arrested on a deportation charge. It was claimed by the defendant that the Government was primarily interested in prosecuting him for espionage and that the search of his room was a ruse by Government agents to obtain evidence in the espionage case. The good faith of the Government agents was the issue in question. The question here is whether defendants were coerced to testify against themselves. If they were coerced within the meaning of the Fifth Amendment, the violation cannot be condoned merely because the Government agents acted in good faith. It is little comfort to the aggrieved party that those who deprive him of a constitutional right are men of good intentions.

The Government contends that the Fourth and Fifth Amendments do not prohibit the use of subpoenaed corporate books and records in a criminal prosecution against the corporation and its officers, citing *Essgee Co.* v. *United States*, 262 U.S. 151 (1923), and *Wilson* v. *United States*, 221 U.S. 361 (1911). These and other subsequent cases do so hold, but these interrogatories went far beyond a

subpoena for corporate books and records. Feldten signed the answers to the interrogatories in his capacity as vice president but Kordel, as president, was under the same compulsion as Feldten to furnish the answers. Although the privilege against self-incrimination is personal, *White* v. *United States*, 322 U.S. 694 (1944), the interrogatories were for the most part requests for admissions by and information about the individual defendants, Kordel and Feldten. Many of the interrogatories required answers revealing Kordel's activities, speeches, and representations then under scrutiny in the contemplated criminal action. An officer in a corporation does not lose his personal privilege against self-incrimination under the Fifth Amendment by reason of his corporate position.

In *Wilson*, which is a forerunner of those cases holding that corporation officers may not invoke their Fifth Amendment rights to prevent the production of corporate records, Mr. Justice Hughes drew the distinction in these words:

> "They may decline to utter upon the witness stand a single self-incriminating word. They may demand that any accusation against them individually be established without the aid of their oral testimony or the compulsory production by them of their private papers." 221 U.S. at 385.

It is said in the Government's brief that all of the evidence used in the criminal case was obtained by independent investigation and that evidence obtained through the interrogatories was not used in the criminal action. We find no tangible support in the record for this statement. It is admitted by Mr. Fowler, the Government agent on whose testimony the indictment was returned—he was the only witness who appeared before the grand jury—that he used the answers to the interrogatories in preparing his testimony before that body. There is no showing by the Government that any attempt was made at any stage of the proceedings to separate the two cases. There is no testimony or avowal by those who investigated and prosecuted the criminal case that they did not use evidence and leads obtained through answers to the inter-

rogatories. We conclude that evidence and leads obtained by reason of the interrogatories were used against the defendants in the criminal case. The motion to suppress all such evidence should have been sustained.

We do not hold that a Government agency may not institute and prosecute civil proceedings on charges that may also involve a possible criminal violation. We hold merely that the Government may not maneuver an individual into a situation in a civil case where he is faced with a choice that has the effect of compelling him to incriminate himself in a contemplated criminal case. Clearly, this is what occurred in the present case.

Defendants vigorously assert that the indictment should have been quashed for the reason, among others, that Mr. Fowler admitted he used the answers to the interrogatories in organizing his testimony before the grand jury. In light of *United States* v. *Blue*, 384 U.S. 251 (1966), we hold that defendants' argument on this point is not well taken.

We observe for the benefit of the trial judge and counsel in the event of another trial that we find no merit in the other grounds assigned as error by the defendants.

Reversed and remanded for proceedings consistent with this opinion.

ORDER MODIFYING OPINION OF UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 17,639

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[SAME TITLE]

Before: O'Sullivan and Combs, Circuit Judges, and Cecil, Senior Circuit Judge.

The Government's petition for rehearing is granted. The opinion heretofore filed, on July 26, 1968, is modified on its face. The judgment is affirmed as to the corporate defendant, Detroit Vital Foods, Inc., and reversed as to the individual defendants, Lelord Kordel and Alfred Feldten.

Entered by order of the Court:

CARL W. REUSS
Clerk

Filed Feb 20 1969
CARL W. REUSS, Clerk

OPINION BY UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, AS MODIFIED

Decided February 20, 1969

Before: O'SULLIVAN and COMBS, Circuit Judges, and CECIL, Senior Circuit Judge.

COMBS, Circuit Judge. The defendants were found guilty by a jury on five counts of an indictment charging them with introduction into interstate commerce of misbranded drugs and with causing a drug to be misbranded after it had been shipped in interstate commerce. 21 U.S.C. § 331(a) and (k). The defendant Kordel was sentenced to two years imprisonment and to a fine of $10,000.00. The defendant Feldten was sentenced to one year imprisonment, suspended to thirty days with three years probation, and to a fine of $2,000.00. A total fine of $10,000.00 was imposed upon the corporate defendant.

Detroit Vital Foods, Inc., is a Michigan corporation with headquarters in Detroit. The defendants Kordel and Feldten were its president and vice president, respectively. During 1959, 1960, and 1961, Kordel traveled across the country delivering a series of lectures in different cities. Advertisement of the lectures preceded his appearance and the public was invited to attend. The meetings were held in public halls or auditoriums leased for the occasion by the defendants. Sales booths were established in or near the lecture halls where the audience could purchase the company's products Aminex, Frutex, Nutri-Time, Korleen, and other products not here in question, usually at special introductory prices. The company's products were sold not only at the lectures but were generally available in health food stores. Each package had a label attached which described the contents and gave directions for use.

Kordel was the author of numerous books and leaflets, such as "Eat and Grow Younger", "How to Make People Like You", "Health Through Nutrition", and "Is This a New Way to Strengthen Your Heart?"

The books and lectures were discussions of how various physical ailments could be alleviated by the intake of certain foods and food elements. The best source of these foods and food elements, it was said, were the products offered for sale by the defendants. Leaflets distributed to the lecture audiences were to the effect that the statements made were the personal opinion of the speaker and author and that a physician should be consulted in regard to specific diseases.

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Kordel in his lectures and published material advertised some products by name. In other instances, he merely related certain chemicals or food elements to the improvement of various physical ailments and recommended the company's products as the best source. For example:

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>
> Varicose veins existing for twenty-five years were cured in three months with the intake of three Korleen tablets per day.
>
> People may "protect" their bodies from headaches, colds, stiff ankles, poor circulation, gas, constipation, and poor digestion by partaking of a concentrated source of seventy-two different vitamins, minerals, and nutrients—coincidentally, the product which contains all those ingredients is Nutri-Time.
>
> Vitamin C is a preventive and cure for bleeding gums, sore throat, earache, swollen neck glands, pneumonia, and acute rheumatism—the best source of Vitamin C is Frutex.
>
> Protein helps form antibodies to fight infection and is the first line of defense; it is most efficiently assimilated within the body when introduced in the form of a concentrated protein tablet—the recommended source is Super Protein Aminex which has a high concentrate of protein and all aminal acids in the proper balance.

Kordel occasionally stated that his remarks had no relation to drugs, that he spoke only of natural nutrients used as food supplements.

Several grounds of assigned error were argued in briefs but we consider it necessary to discuss only one. We hold that the judgments must be reversed because defendants were compelled to give testimony against themselves in violation of the Fifth Amendment to the United States Constitution.

While defendants were under investigation for possible criminal violation of the Food, Drug and Cosmetic Act, the Government instituted a civil action against Detroit Vital Foods, Inc., to condemn certain quantities of their products Korleen and Frutex, asserting that these articles were misbranded. In the civil action the defendants were served with extensive written interrogatories seeking comprehensive and detailed information about the corporate defendant and the activities of the individual defendants in connection with the company's business. Before these interrogatories were answered defendants were notified that the Government contemplated taking criminal action against them because of their activities in connection with Korleen and Frutex.

The defendants filed objections to being required to answer the interrogatories and moved to stay the civil proceedings pending outcome of the contemplated criminal action. The objections and motion were denied by the Honorable Theodore Levin, United States District Judge for the Eastern District of Michigan, who reasoned that the defendants would not necessarily be prejudiced since there was no certainty when, or if, a criminal action would be brought. The defendants then filed answers to the interrogatories pursuant to Judge Levin's order. Much of the information supplied by the defendants in answer to the interrogatories was necessary to the Government's case in the criminal prosecution.

Prior to the trial of this action, the defendants moved to quash the indictment and to suppress all evidence and leads obtained by the Government in the civil action. The trial judge, Honorable Ralph M. Freeman, granted a hearing on the motions and thereafter denied them. It was developed at the hearing that the civil case and the

investigation of the criminal case went forward on a common front. Information obtained in the civil case was transmitted to those in charge of the criminal investigation, and recommendation for criminal prosecution was not made until after Judge Levin had ordered the interrogatories to be answered in the civil case. The interrogatories were prepared by Mr. Randolph of the Food and Drug Administration in Washington, who made the initial decision to recommend criminal action against the defendants. The answers to the interrogatories were sent to Mr. Randolph and the indictment was prepared in Randolph's office.

In no sense was the action of the defendants in answering the interrogatories voluntary. When ordered to do so after their objections had been overruled, they had three possible courses available to them. They could still have refused to answer. This almost certainly would have resulted in the forfeiture of their property which had been seized by the Government. They could have given false answers to the interrogatories. This would have subjected them to possible prosecution for perjury. Their third course was to supply the required information, thereby possibly incriminating themselves in the contemplated criminal action. In choosing the third course defendants supplied the Government with evidence and leads helpful in securing their indictment and subsequent conviction. Their choice was a hard one and the specific question is whether they could be required to make a choice. We think not. A person may not be required to supply information which might possibly incriminate him upon penalty of suffering a forfeiture of his property. This is a "compelling" which is prohibited by the Fifth Amendment. The early case of *Boyd* v. *United States*, 116 U.S. 616 (1886), is in point.

Boyd was a civil action to seize goods allegedly imported without the payment of customs duties. The Government attempted to subpoena invoices which were in the possession of the defendants. The Supreme Court, regarding the action as having a "quasi-criminal" nature, denied the Government's right to subpoena the invoices, holding that

> "[A] compulsory production of the private books and papers of the owners of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment." 116 U.S. at 634, 635

The same principle was involved in *Garrity* v. *New Jersey*, 385 U.S. 493 (1967). There, certain policemen had been convicted of a conspiracy to obstruct the administration of the New Jersey traffic laws. The policemen appealed on the ground that statements obtained in violation of their privilege against self-incrimination were used as evidence to convict them. The incriminatory statements were obtained during an investigation by the New Jersey Attorney General into the fixing of traffic tickets. The policemen were questioned during this investigation, after being informed of their privilege against self-incrimination but were warned that if they refused to answer they could be removed from their jobs.

They answered the questions, and their answers were later used to convict them. The Supreme Court reversed the convictions and held that the use of the statements violated the petitioners' privilege against self-incrimination. The Court said:

> "The choice given the petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or remain silent. That practice, like interrogation practices we revewed in *Miranda* v. *Arizona*, 384 U.S. 436, 464-465, is 'likely to exert such pressure upon an individual as to disable him from making a free and rational choice.' We think the statements were infected by the coercion inherent in this scheme of questioning and cannot be sustained as voluntary under our prior decisions." 385 U.S. at 497, 498.

The Supreme Court has consistently held that a penalty may not be placed upon one for exercising his privilege against self-incrimination. *Spevack* v. *Klein*, 385 U.S. 511 (1967), and *Slochower* v. *Board of Education*, 350 U.S. 551 (1956). Also see *United States* v. *Parrott*, 248 F. Supp. 196 (D. D. C. 1965); *United States* v. *Thayer*, 214 F. Supp. 929 (DC Colo. 1963); *Lord* v. *Kelley*, 223 F. Supp. 684 (DC Mass. 1963); *United States* v. *Lipshitz*, 132 F. Supp. 519 (E. D. N. Y. 1955); and *United States* v. *Guerrina*, 112 F. Supp. 126 (E. D. Pa. 1953).

At the hearing held by Judge Freeman on the motion to quash the indictment and to suppress evidence obtained through the interrogatories, evidence was heard on the issue of the Government's good faith in bringing the civil action. Judge Freeman concluded that the civil action was brought in good faith and was not a subterfuge to obtain evidence for a criminal prosecution. He held therefore that the evidence was not tainted, relying on *Abel* v. *United States*, 362 U.S. 217 (1960).

Abel is not controlling here. That case involved a search and seizure issue; compulsory self-incrimination was not involved. The civil and criminal charges in *Abel* were only remotely related and it was by chance that evidence helpful in a criminal prosecution was obtained in the search. Moreover, the limits of the search were much more restricted than is the scope of permissible inquiry in civil interrogatories. In *Abel* it was conceded that the questioned evidence was obtained during a legal search of the defendant's hotel room after he was arrested on a deportation charge. It was claimed by the defendant that the Government was primarily interested in prosecuting him for espionage and that the search of his room was a ruse by Government agents to obtain evidence in the espionage case. The good faith of the Government agents was the issue in question. The question here is whether defendants were coerced to testify against themselves. If they were coerced within the meaning of the Fifth Amendment, the violation cannot be condoned merely because the Government agents acted in good faith. It is little comfort to the aggrieved party that those who deprive him of a constitutional right are men of good intentions.

The Government contends that the Fourth and Fifth Amendments do not prohibit the use of subpoenaed corporate books and records in a criminal prosecution against the corporation and its officers, citing *Essgee Co.* v. *United States*, 262 U.S. 151 (1923), and *Wilson* v. *United States*, 221 U.S. 361 (1911). These and other subsequent cases do so hold, but these interrogatories went far beyond a subpoena for corporate books and records. Kordel was president of the company and Feldten was vice president. Feldten signed the answers to the interrogatories in his capacity as vice president but Kordel, as president, was under the same compulsion as Feldten to furnish the answers. Although the privilege against self-incrimination is personal, *White* v. *United States*, 322 U.S. 694 (1944), the interrogatories were for the post part requests for admissions by and information about the individual defendants, Kordel and Feldten. Many of the interrogatories required answers revealing Kordel's activities, speeches, and representations then under scrutiny in the contemplated criminal action. An officer in a corporation does not lose his personal privilege against self-incrimination under the Fifth Amendment by reason of his corporate position.

In *Wilson*, which is a forerunner of those cases holding that corporation officers may not invoke their Fifth Amendment rights to prevent the production of corporate records, Mr. Justice Hughes drew the distinction in these words:

> "They may decline to utter upon the witness stand a single self-incriminating word. They may demand that any accusation against them individually be established without the aid of their oral testimony or the compulsory production by them of their private papers." 221 U.S. at 385.

It is said in the Government's brief that all of the evidence used in the criminal case was obtained by independent investigation and that evidence obtained through the interrogatories was not used in the criminal action. We find no tangible support in the record for this statement. It is admitted by Mr. Fowler, the Government

agent on whose testimony the indictment was returned—he was the only witness who appeared before the grand jury, that he used the answers to the interrogatories in preparing his testimony before the grand jury. There is no showing by the Government that any attempt was made at any stage of the proceedings to separate the two cases. There is no testimony or avowal by those who investigated and prosecuted the criminal case that they failed to use evidence and leads obtained through answers to the interrogatories. It is admitted by Government witnesses that in the enforcement of the Federal Food, Drug and Cosmetic Act it is not unusual for the Government first to commence a civil action and then use information obtained in that case in parallel criminal proceedings. Information obtained from whatever source is placed in one general file. We note, too, that the interrogatories submitted by the Government were broader than would ordinarily be needed in a civil case. Some of the interrogatories were directed specifically toward the activities of Lelord Kordel, president of Detroit Vital Food, Inc., and the principal defendant in this case. We conclude from this record that evidence and leads obtained by reason of the interrogatories were used against the defendants in the criminal case.

It is pointed out by the Government that the Fifth Amendment privilege against self-incrimination is available only to natural persons and not to a corporation. We agree that this defense is not available to the corporate defendant, Detroit Vital Foods, Inc. *Campbell Printing Co.* v. *Reid*, 392 U.S. 286 (1968).

It is also argued by the Government that the Fifth Amendment privilege is not available to the individual defendant Kordel because he made no claim to the seized property and supplied no answers to the interrogatories. With this argument we do not agree. It is clear from the record that Detroit Vital Foods, Inc., was merely the corporate device through which Kordel sold his products. The Government naturally wanted to cut through the facade and get to Kordel who was the president and dominant personality in the corporation. Although the extent of Kordel's ownership in the corporation is not

disclosed by the testimony before us, he evidently was a major stockholder. He therefore had a financial interest in the seized property and certainly, as president of the company, he participated in the decision to answer the interrogatories. Aside from this, if it should be conceded that Kordel was under no coercion to answer the interrogatories, we are of the opinion that Feldtem's admissions were not admissible against him under the rule of *Bruton* v. *United States*, 391 U.S. 123 (1968). We conclude therefore that evidence and leads obtained by reason of the interrogatories should have been suppressed against the individual defendants in the criminal case.

We do not hold that a government agency may not institute and prosecute civil proceedings on charges that may also involve a possible criminal proceeding against the same persons. We hold merely that the Government may not use evidence against a defendant in a criminal case which has been coerced from him under penalty of either giving the evidence or suffering a forfeiture of his property.

The judgment is reversed as to the individual defendants, Kordel and Feldten, and the case is remanded for proceedings consistent with this opinion. The judgment is affirmed as to the corporate defendant, Detroit Vital Foods, Inc.

SUPREME COURT OF THE UNITED STATES

No. 1291, October Term, 1968

UNITED STATES, PETITIONER

v.

LELORD KORDEL AND ALFRED FELDTEN

ORDER ALLOWING CERTIORARI—Filed June 2, 1969

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Reasons for granting the writ	9
Conclusion	15
Appendix A	16
Appendix B	27

CITATIONS

Cases:

Abel v. *United States*, 362 U.S. 217	14
Boyd v. *United States*, 116 U.S. 616	11, 12
Brown v. *Walker*, 161 U.S. 591	13
Bruton v. *United States*, 391 U.S. 123	9, 14
Campbell Painting Co. v. *Reid*, 392 U.S. 286	12
Communist Party v. *United States*, 331 F. 2d 807, certiorari denied, 377 U.S. 968	11
Garrity v. *New Jersey*, 385 U.S. 493	11, 12
Kordel v. *United States*, 335 U.S. 345	3
Marchetti v. *United States*, 390 U.S. 39	13
Nature Food Centres, Inc. v. *United States*, 310 F. 2d 67, certiorari denied, 371 U.S. 968	4, 13
Rogers v. *United States*, 340 U.S. 367	13
United States v. *Article of Drug*, 43 F.R.D. 181	10, 11
United States v. *Article of Drug* * * * *B-Complex Cholinos Capsules*, 362 F. 2d 923	13

Cases—Continued Page

United States v. *Blue*, 384 U.S. 251 ... 11
United States v. *Detroit Vital Foods, Inc.*, 330 F. 2d 78, certiorari denied, 379 U.S. 832 ... 5
United States v. *42 Jars * * **, *Bee Royale Capsules*, 264 F. 2d 666 ... 10, 11
United States v. *48 Jars * * **, 23 F.R.D. 192 ... 10, 11
United States v. *Light*, 394 F. 2d 908 ... 11
United States v. *Parrott*, S.D.N.Y., No. 66 Cr. 243, decided February 14, 1969 ... 10
United States v. *Monia*, 317 U.S. 424 ... 13
United States v. *39 Cases * * * Mich. Brand Korleen Tablets*, 192 F. Supp. 51 ... 5
United States v. *3963 Bottles * * * Enerjol*, 265 F. 2d 332, certiorari denied, 360 U.S. 931 ... 10, 11
United States v. *White*, 322 U.S. 694 ... 12
Wilson v. *United States*, 221 U.S. 361 ... 12

Constitution, statutes and rule:

United States Constitution:

Fifth Amendment ... 6, 7, 8, 14
Sixth Amendment ... 14

Federal Food, Drug and Cosmetic Act:

21 U.S.C. 331 ... 2
21 U.S.C. 333 ... 3
21 U.S.C. 334 ... 4
21 U.S.C. 335 ... 5
21 U.S.C. 352 ... 4, 13

Federal Rules of Civil Procedure:

Rule 30(b) ... 12
Rule 33 ... 2, 5, 11, 12

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. ———

UNITED STATES OF AMERICA, PETITIONER

v.

LELORD KORDEL and ALFRED FELDTEN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General on behalf of the United States petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on February 20, 1969.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 1968, and was modified on petition for

rehearing on February 20, 1969. On March 12, 1969, Mr. Justice Stewart extended the government's time for filing a petition for a writ of certiorari to and including April 21, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a prosecution for violation of the food and drugs laws, respondents' privilege against self-incrimination was violated by the fact that the government, in a prior civil proceeding to condemn the drugs owned by the corporation of which respondents were officers, had directed interrogatories to the corporation pursuant to Rule 33, F.R. Civ. P., with respect to respondents' activities in connection with the drugs.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, respondents and their corporate employer, Detroit Vital Foods, Inc., were convicted on five counts of an indictment charging them with introducing into interstate commerce certain misbranded drugs (Frutex wafers, Lecigan granules, Aminex and Nutri-Time tablets) and with performing acts which resulted in the misbranding of the drug Korleen while it was being held for sale after shipment in interstate commerce (21 U.S.C. 331(a), (k)). Respondent Kordel was sentenced to two years' imprisonment and a fine of $10,000; respondent Feldten was sentenced to imprison-

ment for one year, suspended to thirty days with three years' probation, and was fined $2000; the corporation was fined $10,000.[1]

Detroit Vital Foods, Inc., is a Michigan corporation with its headquarters in Detroit. Respondent Kordel was its president and respondent Feldten its treasurer (250b-252b).[2] Kordel was the author of numerous books and leaflets promoting the products of Detroit Vital Foods, Inc. As the court of appeals found, the evidence showed that during the years 1959-1961 Kordel traveled across the country delivering lectures in various cities which were advertised and open to the public. The books and lectures were discussions of how various physical ailments could be alleviated by the intake of certain foods and food elements. The best source of these foods and food elements, it was said, were the products offered for sale by the respondents (App., *infra*, p. 17). The company's products were sold at booths established in or near the lecture halls and were also available in health food stores generally. Feldten made no speeches but acted as Kordel's assistant. He sold the products at lectures and took orders for products to be shipped from Detroit (App., *infra*, p. 17). The essence of the criminal charges against respondents was that, as to

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[1] Respondent Feldten and Detroit Vital Foods, Inc., were found guilty of misdemeanors as first offenders. Respondent Kordel was found guilty of felonies by virtue of his prior conviction for violation of Section 331. See, affirming the previous conviction, *Kordel* v. *United States*, 335 U.S. 345; see, also, 21 U.S.C. 333.

[2] See n. 3, *infra*.

some of the products, certain books and leaflets written by Kordel constituted part of the labeling and contained false and misleading statements. In addition, the indictment alleged, as to all counts on which respondents were convicted,[3] that the products (claimed by defendants to be merely food supplements) were in fact drugs intended by defendants to be used for the prevention and treatment of various diseases and conditions (see App., *infra*, pp. 17-18) and that the labeling for them was deficient under 21 U.S.C. 352(f) in that it failed to set forth adequate directions for use (*e.g.*, the dosage, frequency and duration of administration of each drug).[4] The government proved Kordel's representations about the drugs by introducing tape recordings of Kordel's public lectures.

The indictment in this case was returned in August 1963. On June 9, 1960, the government had filed a libel under 21 U.S.C. 334 seeking to condemn quantities of the products Korleen tablets and Frutex, on the ground that they had been misbranded while held for sale after shipment in interstate commerce. The

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[3] Respondents were convicted on counts 4, 8, 9, 10, and 11 of the indictment, which are set forth at pages 13a-17a and 26a-39a of defendants' appendix in the court below. We are causing a copy of that appendix to be filed as part of the record with the Clerk of this Court as well as the appendix for the government (citations to the former are denoted by the letter (a), and to the latter by the letter (b), following the page reference), both of which contain pertinent excerpts from the proceedings at trial.

[4] An example of an almost identical prosecution is *Nature Food Centres, Inc.* v. *United States*, 310 F.2d 67 (C.A. 1), certiorari denied, 371 U.S. 968.

corporate defendant, Detroit Vital Foods, Inc., filed a claim and answer denying the material allegations of the libel. During the course of the civil suit, which terminated favorably to the government (see *United States* v. *Detroit Vital Foods, Inc.*, 330 F. 2d 78 (C.A. 6), certiorari denied, 379 U.S. 832),[5] the government served interrogatories upon the claimant pursuant to Rule 33, F.R. Civ. P.[6] The interrogatories were filed on January 9, 1961, and sought detailed information about the corporate defendant and Kordel's activities with relation to oral representations about the products Frutex and Korleen tablets made during the lecture series at Detroit between March 29, and April 8, 1960.[7] In April 1961 Detroit Vital Foods, Inc., moved to stay the libel action on the ground that criminal prosecution was being considered by the government. The motion recited that in late January 1961, shortly after service of the interrogatories by the government, the company had received a notice of hearing under 21 U.S.C. 335,[8] indicating that crim-

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[5] See, also, *United States* v. *39 Cases * * * Mich. Brand Korleen Tablets*, 192 F. Supp. 51 (E.D. Mich.).

[6] The interrogatories and the answers thereto are set forth in defendants' supplemental appendix in the court below, a copy of which is being filed as part of the record with the Clerk of this Court.

[7] Count 4 of the instant indictment, on which respondents were convicted, was based on this lecture-promotion. The other counts were based on lecture-promotions of March 7-17, 1960, given at New York, and April 4-14, 1961, given at Detroit.

[8] 21 U.S.C. 335 provides that "Before any violation of this chapter is reported by the Secretary to any United States

inal prosecution of the corporation and respondents was contemplated, in part for the same conduct which was the subject of the libel. The motion asked that the claimant's time to respond to the government's interrogatories be extended until after final disposition of the criminal case pursuant to the court's discretionary power,[9] since answering the interrogatories would disclose the basis of the claimant's defense in the criminal case. On June 30, 1961, the district court denied the motion for a stay, on the ground that there was no certainty when or whether a criminal prosecution would be brought and that the corporation was not prejudiced by being required to answer the interrogatories, since the government could in any event obtain information pertinent to a criminal case from the trial of the libel action itself.[10] The court ordered claimant to answer the interrogatories or file objections within twenty days. Answers to the interrogatories were subsequently filed by the respondent Feldten for Detroit Vital Foods, Inc. Feldten subscribed to the answers as vice president of the claimant and stated that the answers were true to the best of his knowledge and belief but that not all of the answers

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attorney for institution of a criminal proceeding, the person against whom such proceeding is contemplated shall be given appropriate notice and an opportunity to present his views, either orally or in writing, with regard to such contemplated proceeding."

[9] Reliance on the Fifth Amendment privilege against self-incrimination was expressly eschewed.

[10] We are lodging with the Clerk of this Court a copy of the district court's decision denying claimant's motion to stay the libel proceeding.

were known to him personally. Objections to certain of the interrogatories were submitted by claimant and overruled before the answers were in fact furnished. At no time did claimant or either respondent lodge an objection to any question on Fifth Amendment grounds.

The matter was referred to the Attorney General with a recommendation for prosecution on June 13, 1962, and an indictment was returned on August 5, 1963. On March 22, 1965, respondents and Detroit Vital Foods, Inc., moved to suppress "any evidence or leads obtained therefrom by the Federal Government in compulsory discovery proceedings instituted by the Government" in the libel action (55a). They contended that the use of such evidence and leads constituted "an unconstitutional exercise of inquisitorial authority, and is violative of civilized standards of procedures in the administration of criminal justice" *(ibid.)*. In the alternative the motion requested a hearing to determine the government's good faith and motive in commencing the civil action and serving the interrogatories. The court denied the motion to suppress but granted the request for a hearing. After a three-day hearing (see 1b-66b), the district court found that at the time the civil case was filed, the attorney for the Department of Health, Education and Welfare had evidence to establish all of the elements of the criminal offenses, and that the purpose of the interrogatories was to narrow the issues and to lay a foundation for a motion for summary judgment. The court determined that the government did

not act in bad faith in starting the civil suit or in filing the interrogatories, and that there was then no certainty that a criminal prosecution would be brought (103a-106a).

On July 26, 1968, the court of appeals for the Sixth Circuit reversed the convictions of all defendants on the ground that they had been denied the protection afforded by the Fifth Amendment. The government filed a petition for rehearing which was granted. On February 20, 1969, the court of appeals modified its written opinion so as to affirm the conviction of the corporate defendant, but adhered to its judgment reversing the convictions of respondents Kordel and Feldten.

Although the interrogatories had not been introduced into evidence in the criminal case, the court of appeals found that the government had not proved that information and leads obtained thereby had not been utilized in securing the indictment or obtaining evidence admitted at the trial (See App., *infra*, pp. 19-20, 24-26). The court held that the good faith of the government in using the interrogatories was irrelevant, since, by requiring the corporation to answer the interrogatories, the government had compelled the individual respondents to incriminate themselves. The court purported to recognize that the privilege against self-incrimination is available only to natural persons and not to a corporation. It held, nevertheless, that the Fifth Amendment privilege was available to both Feldten and Kordel even though neither had interposed any claim to the seized drugs, neither was a

party to the civil action, and Kordel had supplied no answers to the interrogatories.[11]

REASONS FOR GRANTING THE WRIT

The decision below holds that, because the government brought a civil suit to remove misbranded drugs from circulation, and in the course thereof adopted normal procedures of using interrogatories to narrow the issues, individual officers of the corporate owner of the drugs obtained, in effect, immunity from prosecution for their individual misdeeds. In holding that interrogatories addressed to a corporation violated the Fifth Amendment privilege of the individual respondents, the court of appeals has decided an important question in a manner contrary to the decisions of this Court and of other courts of appeals. As the court below noted, "it is not unusual for the Government first to commence a civil action and then use information obtained in that case in parallel criminal proceedings" (App., *infra*, p. 25). While the quoted statement was made specifically with reference to the enforcement of the Federal Food, Drug and Cosmetic Act, it is likewise applicable—and the decision thus has similar impact—in the areas of antitrust, internal revenue, and securities regulation (among others), where federal agencies are vested with the responsibility of ad-

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[11] Although the answers to the interrogatories were not introduced in evidence at the trial, the court of appeals also held that Feldten's answers to the interrogatories, which it characterized as "admissions" (App., *infra*, p. 26), were not admissible against Kordel under the rule of *Bruton* v. *United States*, 391 U.S. 123.

ministering statutes providing both civil and criminal remedies against offending corporations and/or individuals. The problem created by the court's ruling is particularly acute in the food and drug field because of the obvious need for the government to act quickly in bringing civil condemnation proceedings in order to protect the public by removing misbranded or adulterated drugs from circulation in situations in which further investigation is appropriate before it is decided whether or not to institute criminal proceedings. In the course of such civil proceedings it is not uncommon for the government to use interrogatories or other forms of discovery designed to simplify the issues and thereby expedite the court action. It is precisely such good faith use of civil discovery techniques, directed to the corporate claimant, which has been held by the court below to violate respondents' privilege against self-incrimination.

This holding is in conflict with decisions of other federal courts of appeals and several district courts as to the critical question whether submission of the interrogatories to the corporation "compelled" the individual respondents to incriminate themselves, or suffer forfeiture of their property. See *United States* v. *3963 Bottles* * * * *Enerjol*, 265 F. 2d 332, 335-336 (C.A. 7), certiorari denied, 360 U.S. 931; *United States* v. *42 Jars* * * * *Bee Royale Capsules*, 264 F. 2d 666, 670 (C.A. 3); *United States* v. *48 Jars* * * *, 23 F.R.D. 192, 193-196 (D.D.C.); *United States* v. *Article of Drug*, 43 F.R.D. 181, 186-187 (D. Del.); see, also, *United States* v. *Parrott*, S.D.N.Y., No. 66 Cr. 243, decided February 14, 1969; cf. *United States* v.

Blue, 384 U.S. 251; *United States* v. *Light*, 394 F. 2d 908 (C.A. 2). As the *Enerjol* and *Bee Royale* cases make clear, there is no requirement under Rule 33, F.R. Civ. P., that the person answering interrogatories on behalf of a corporation have personal knowledge of the truth of the answers furnished. Nor is there any requirement that the interrogatories be answered by an officer or agent of the corporation who might incriminate himself by doing so. The submission of interrogatories to the corporation merely imposes a duty *on the corporation* to "appoint an agent who could, without fear of self-incrimination, furnish such requested information as was available to the corporation." *Enerjol, supra*, 265 F. 2d at 336. Respondents here have never attempted to make a showing that no officer or employee of the corporation was available to answer the interrogatories without risk of self-incrimination. And even if such were the case, the corporation would be obligated to designate another agent, such as its attorney, to answer the interrogatories. *United States* v. *48 Jars, supra*, 23 F.R.D. at 196; *United States* v. *Article of Drug, supra*, 43 F.R.D. at 187; compare the special situation in *Communist Party* v. *United States*, 331 F. 2d 807, 814 (C.A.D.C.), certiorari denied, 377 U.S. 968. Thus respondents were in no way "coerced" (App., *infra*, p. 26) into supplying answers to the interrogatories.

The situation here is manifestly different from that in *Boyd* v. *United States*, 116 U.S. 616, and *Garrity* v. *New Jersey*, 385 U.S. 493, relied on by the court below (App., *infra*, p. 21), where statutes were held to compel individuals to incriminate themselves by

giving them a "choice" between furnishing evidence or losing their property. In likening the present case to *Boyd* and *Garrity*, the court of appeals made the critical error of treating the property seized by the government as respondents' property, which would be liable to forfeiture if they did not answer the interrogatories (App., *infra*, p. 20). Respondents were not parties to the libel suit and claimed no personal interest in the property which was the subject of that action. The seized drugs were the property of the corporation. Whatever the relationship of respondent Kordel to the corporation, he could not utilize the benefits of the corporate form of doing business and still claim an individual, personal interest in the property. And, of course, the corporation had no privilege against self-incrimination and was incapable of asserting such a privilege on behalf of any individual officer or employee. *E.g.*, *Campbell Painting Co.* v. *Reid*, 392 U.S. 286; *United States* v. *White*, 322 U.S. 694; *Wilson* v. *United States*, 221 U.S. 361.

The court of appeals was apparently influenced by its belief that the interrogatories in the civil condemnation action were broader than was necessary for the purposes of the suit (see App., *infra*, p. 25). As we have indicated, even the submission of improper and overbroad interrogatories to the corporation would not have violated respondents' privilege against self-incrimination since they were under no compulsion to answer. Moreover, Rules 30(b) and 33, F.R. Civ. P., provide the method by which a party in a civil proceeding may be excused from answering improper or overbroad interrogatories. One who fails to pursue

this remedy and chooses, instead, to answer the interrogatories should not thereafter be heard to claim that the answers violated the privilege against self-incrimination.[12] Invocation of that privilege in a subsequent criminal prosecution should not be permitted to serve as a substitute for appeal from an adverse ruling on a motion to limit the scope of, or extend the time for answering, interrogatories in the civil proceedings.

In any event, the interrogatories at issue here did not seek information which was not directly pertinent to the civil case. The allegation in the libel was, in part, that the drugs were misbranded in violation of 21 U.S.C. 352(f) because of failure of the labeling to bear adequate directions for use *for the purposes for which the drugs were intended.* An oral statement can constitute proof of the intended use of a product. *E.g., Nature Food Centres, Inc.* v. *United States,* 310 F. 2d 67 (C.A. 1), certiorari denied, 371 U.S. 968; *United States* v. *Article of Drug * * * B-Complex Cholinos Capsules,* 362 F. 2d 923 (C.A. 3). The theory of the government's libel action was that products labeled as foods were being represented, in oral lectures, to be efficacious as drugs. While the government could have proved these oral representations at trial by means of tape recordings in its possession, it manifestly would have expedited the civil suit if

---

[12] This Court has repeatedly held that the privilege against self-incrimination is not available to one who fails to invoke it in a timely and proper manner. See, *e.g., Marchetti* v. *United States,* 390 U.S. 39, 61; *Rogers* v. *United States,* 340 U.S. 367, 372-375; *United States* v. *Monia,* 317 U.S. 424, 427; *Brown* v. *Walker,* 161 U.S. 591, 597.

the government could establish the content of these representations by means of interrogatories and thus be in a position to move for summary judgment. It was therefore proper to determine whether the corporate claimant agreed that representations had been made by corporate representatives as to the disease-curing efficacy of the products. The interrogatories to the corporation were properly directed toward these ends and were thus pertinent to the issues in the civil suit. As the district judge found, the interrogatories were submitted in good faith, after notice to the corporation that criminal proceedings were being contemplated. See *Abel* v. *United States*, 362 U.S. 217.[13]

In sum, there is no basis either in the Fifth Amendment or in the law surrounding the proper use of interrogatories to support the holding of the court below, the net effect of which is to make it unwarrantedly hazardous for an agency of the government to utilize interrogatories in a civil action against a corporation believed to have violated the law, in the not uncommon situation where there is a possibility of criminal prosecution of individual officers thereof for their part in the illegal activity. We therefore

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[13] The court of appeals' alternative holding that submission of the interrogatories (which were answered for the corporation by Feldten) violated Kordel's right under *Bruton* v. *United States*, 391 U.S. 123 (App., *infra*, p. 26) is plainly erroneous. *Bruton* held that the admission into evidence in a joint trial of the confession of a co-defendant violated the defendant's Sixth Amendment right of confrontation. Here, as previously indicated, the answers to the interrogatories, which did not in any event constitute a confession by Feldten, were not admitted into evidence in the criminal prosecution.

urge this Court to review and reverse the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1969.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 17639

Filed Feb. 20, 1969, Carl W. Reuss, Clerk

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

DETROIT VITAL FOODS, INC., LELORD KORDEL, AND ALFRED FELDTEN, DEFENDANTS-APPELLANTS

Appeal from the United States District Court,
Eastern District of Michigan

Decided February 20, 1969

Before: O'SULLIVAN and COMBS, Circuit Judges, and CECIL, Senior Circuit Judge.

COMBS, Circuit Judge. The defendants were found guilty by a jury on five counts of an indictment charging them with introduction into interstate commerce of misbranded drugs and with causing a drug to be misbranded after it had been shipped in interstate commerce. 21 U.S.C. § 331(a) and (k). The defendant Kordel was sentenced to two years imprisonment and to a fine of $10,000.00. The defendant Feldten was sentenced to one year imprisonment, suspended to thirty days with three years probation, and to a fine of $2,000.00. A total fine of $10,000.00 was imposed upon the corporate defendant.

Detroit Vital Foods, Inc., is a Michigan corporation with headquarters in Detroit. The defendants Kordel and Feldten were its president and vice president, respectively. During 1959, 1960, and 1961, Kordel traveled across the country delivering a series of lectures in different cities. Advertisement of the lectures preceded his appearance and the public was invited to attend. The meetings were held in public halls or auditoriums leased for the occasion by the defendants. Sales booths were established in or near the lecture halls where the audience could purchase the company's products Aminex, Frutex, Nutri-Time, Korleen, and other products not here in question, usually at special introductory prices. The company's products were sold not only at the lectures but were generally available in health food stores. Each package had a label attached which described the contents and gave directions for use.

Kordel was the author of numerous books and leaflets, such as "Eat and Grow Younger", "How to Make People Like You", "Health Through Nutrition", and "Is This a New Way to Strengthen Your Heart?"

The books and lectures were discussions of how various physical ailments could be alleviated by the intake of certain foods and food elements. The best source of these foods and food elements, it was said, were the products offered for sale by the defendants. Leaflets distributed to the lecture audiences were to the effect that the statements made were the personal opinion of the speaker and author and that a physician should be consulted in regard to specific diseases.

Feldten made no speeches but acted as Kordel's assistant. He sold the products at lectures and took orders for products to be shipped from Detroit.

Kordel in his lectures and published material advertised some products by name. In other instances,

he merely related certain chemicals or food elements to the improvement of various physical ailments and recommended the company's products as the best source. For example:

> A combination of chlorine, methionine, and inositol—exactly the ingredients of Korleen—is a successful treatment for cirrhosis of the liver.
>
> Varicose veins existing for twenty-five years were cured in three months with the intake of three Korleen tablets per day.
>
> People may "protect" their bodies from headaches, colds, stiff ankles, poor circulation, gas, constipation, and poor digestion by partaking of a concentrated source of seventy-two different vitamins, minerals, and nutrients—coincidentally, the product which contains all those ingredients is Nutri-Time.
>
> Vitamin C is a preventive and cure for bleeding gums, sore throat, earache, swollen neck glands, pneumonia, and acute rheumatism—the best source of Vitamin C is Frutex.
>
> Protein helps form antibodies to fight infection and is the first line of defense; it is most efficiently assimilated within the body when introduced in the form of a concentrated protein tablet—the recommended source is Super Protein Aminex which has a high concentrate of protein and all animal acids in the proper balance.

Kordel occasionally stated that his remarks had no relation to drugs, that he spoke only of natural nutrients used for food supplements.

Several grounds of assigned error were argued in briefs but we consider it necessary to discuss only one. We hold that the judgments must be reversed because defendants were compelled to give testimony against

themselves in violation of the Fifth Amendment to the United States Constitution.

While defendants were under investigation for possible criminal violation of the Food, Drug and Cosmetic Act, the Government instituted a civil action against Detroit Vital Foods, Inc., to condemn certain quantities of their products Korleen and Frutex, asserting that these articles were misbranded. In the civil action the defendants were served with extensive written interrogatories seeking comprehensive and detailed information about the corporate defendant and the activities of the individual defendants in connection with the company's business. Before these interrogatories were answered defendants were notified that the Government contemplated taking criminal action against them because of their activities in connection with Korleen and Frutex.

The defendants filed objections to being required to answer the interrogatories and moved to stay the civil proceedings pending outcome of the contemplated criminal action. The objections and motion were denied by the Honorable Theodore Levin, United States District Judge for the Eastern District of Michigan, who reasoned that the defendants would not necessarily be prejudiced since there was no certainty when, or if, a criminal action would be brought. The defendants then filed answers to the interrogatories pursuant to Judge Levin's order. Much of the information supplied by the defendants in answer to the interrogatories was necessary to the Government's case in the criminal prosecution.

Prior to the trial of this action, the defendants moved to quash the indictment and to suppress all evidence and leads obtained by the Government in the civil action. The trial judge, Honorable Ralph M. Freeman, granted a hearing on the motions and

thereafter denied them. It was developed at the hearing that the civil case and the investigation of the criminal case went forward on a common front. Information obtained in the civil case was transmitted to those in charge of the criminal investigation, and recommendation for criminal prosecution was not made until after Judge Levin had ordered the interrogatories to be answered in the civil case. The interrogatories were prepared by Mr. Randolph of the Food and Drug Administration in Washington, who made the initial decision to recommend criminal action against the defendants. The answers to the interrogatories were sent to Mr. Randolph and the indictment was prepared in Randolph's office.

In no sense was the action of the defendants in answering the interrogatories voluntary. When ordered to do so after their objections had been overruled, they had three possible courses available to them. They could still have refused to answer. This almost certainly would have resulted in the forfeiture of their property which had been seized by the Government. They could have given false answers to the interrogatories. This would have subjected them to possible prosecution for perjury. Their third course was to supply the required information, thereby possibly incriminating themselves in the contemplated criminal action. In choosing the third course defendants supplied the Government with evidence and leads helpful in securing their indictment and subsequent conviction. Their choice was a hard one and the specific question is whether they could be required to make a choice. We think not. A person may not be required to supply information which might possibly incriminate him upon penalty of suffering forfeiture of his property. This is a "compelling" which is prohibited by the Fifth Amendment. The early case of

Boyd v. *United States*, 116 U.S. 616 (1886), is in point.

Boyd was a civil action to seize goods allegedly imported without the payment of customs duties. The Government attempted to subpoena invoices which were in the possession of the defendants. The Supreme Court, regarding the action as having a "quasi-criminal" nature, denied the Government's right to subpoena the invoices, holding that,

> "[A] compulsory production of the private books and papers of the owners of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment." 116 U.S. at 634, 635

The same principle was involved in *Garrity* v. *New Jersey*, 385 U.S. 493 (1967). There, certain policemen had been convicted of a conspiracy to obstruct the administration of the New Jersey traffic laws. The policemen appealed on the ground that statements obtained in violation of their privilege against self-incrimination were used as evidence to convict them. The incriminatory statements were obtained during an investigation by the New Jersey Attorney General into the fixing of traffic tickets. The policemen were questioned during this investigation, after being informed of their privilege against self-incrimination but were warned that if they refused to answer they could be removed from their jobs.

They answered the questions, and their answers were later used to convict them. The Supreme Court reversed the convictions and held that the use of the

statements violated the petitioners' privilege against self-incrimination. The Court said:

> "The choice given the petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or remain silent. That practice, like interrogation practices we reviewed in *Miranda* v. *Arizona*, 384 U.S. 436, 464-465, is "likely to exert such pressure upon an individual as to disable him from making a free and rational choice." We think the statements were infected by the coercion inherent in this scheme of questioning and cannot be sustained as voluntary under our prior decisions." 385 U.S. at 497, 498.

The Supreme Court has consistently held that a penalty may not be placed upon one for exercising his privilege against self-incrimination. *Spevack* v. *Klein*, 385 U.S. 511 (1967), and *Slochower* v. *Board of Education*, 350 U.S. 551 (1956). Also see *United States* v. *Parrott*, 248 F.Supp. 196 (D D.C. 1965); *United States* v. *Thayer*, 214 F.Supp. 929 (DC Colo. 1963); *Lord* v. *Kelley*, 223 F.Supp. 684 (DC Mass. 1963); *United States* v. *Lipshitz*, 132 F.Supp. 519 (E.D.N.Y. 1955); and *United States* v. *Guerrina*, 112 F.Supp. 126 (E.D.Pa. 1953).

At the hearing held by Judge Freeman on the motion to quash the indictment and to suppress evidence obtained through the interrogatories, evidence was heard on the issue of the Government's good faith in bringing the civil action. Judge Freeman concluded that the civil action was brought in good faith and was not a subterfuge to obtain evidence for a criminal prosecution. He held therefore that the evi-

dence was not tainted, relying on *Abel* v. *United States*, 362 U.S. 217 (1960).

Abel is not controlling here. That case involved a search and seizure issue; compulsory self-incrimination was not involved. The civil and criminal charges in *Abel* were only remotely related and it was by chance that evidence helpful in a criminal prosecution was obtained in the search. Moreover, the limits of the search were much more restricted than is the scope of permissible inquiry in civil interrogatories. In *Abel* it was conceded that the questioned evidence was obtained during a legal search of the defendant's hotel room after he was arrested on a deportation charge. It was claimed by the defendant that the Government was primarily interested in prosecuting him for espionage and that the search of his room was a ruse by Government agents to obtain evidence in the espionage case. The good faith of the Government agents was the issue in question. The question here is whether defendants were coerced to testify against themselves. If they were coerced within the meaning of the Fifth Amendment, the violation cannot be condemned merely because the Government agents acted in good faith. It is little comfort to the aggrieved party that those who deprive him of a constitutional right are men of good intentions.

The Government contends that the Fourth and Fifth Amendments do not prohibit the use of subpoenaed corporate books and records in a criminal prosecution against the corporation and its officers, citing *Essgee Co.* v. *United States*, 262 U.S. 151 (1923), and *Wilson* v. *United States*, 221 U.S. 361 (1911). These and other subsequent cases do so hold, but these interrogatories went far beyond a subpoena for corporate books and records. Kordel was president of the company and Feldten was vice presi-

dent. Feldten signed the answers to the interrogatories in his capacity as vice president but Kordel, as president, was under the same compulsion as Feldten to furnish the answers. Although the privilege against self-incrimination is personal, *White* v. *United States*, 322 U.S. 694 (1944), the interrogatories were for the most part requests for admissions by and information about the individual defendants, Kordel and Feldten. Many of the interrogatories required answers revealing Kordel's activities, speeches, and representations then under scrutiny in the contemplated criminal action. An officer in a corporation does not lose his personal privilege against self-incrimination under the Fifth Amendment by reason of his corporate position.

In *Wilson*, which is a forerunner of those cases holding that corporation officers may not invoke their Fifth Amendment rights to prevent the production of corporate records, Mr. Justice Hughes drew the distinction in these words:

> "They have declined to utter upon the witness stand a single self-incriminating word. They may demand that any accusation against them individually be established without the aid of their oral testimony or the compulsory production by them of their private papers." 221 U.S. at 385.

It is said in the Government's brief that all of the evidence used in the criminal case was obtained by independent investigation and that evidence obtained through the interrogation was not used in the criminal action. We find no tangible support in the record for this statement. It is submitted by Mr. Fowler, the Government agent on whose testimony the indictment was returned as he was the only witness who

appeared before the grand jury, that he used the answers to the interrogatories in preparing his testimony before the grand jury. There is no showing by the Government that any attempt was made at any stage of the proceedings to separate the two cases. There is no testimony or avowel by those who investigated and prosecuted the criminal case that they failed to use evidence and leads obtained through answers to the interrogatories. It is admitted by Government witnesses that in the enforcement of the Federal Food, Drug and Cosmetic Act it is not unusual for the Government first to commence a civil action and then use information obtained in that case in parallel criminal proceedings. Information obtained from whatever source is placed in one general file. We note, too, that the interrogatories submitted by the Government were broader than would ordinarily be needed in a civil case. Some of the interrogatories were directed specifically toward the activities of Leland Kordel, president of Detroit Vital Foods, Inc., and the principal defendant in this case. We conclude from this record that evidence and leads obtained by reason of the interrogatories were used against the defendants in the criminal case.

It is pointed out by the Government that the Fifth Amendment privilege against self-incrimination is available only to natural persons and not to a corporation. We agree that this defense is not available to the corporate defendant, Detroit Vital Foods, Inc. *Campbell Printing Co.* v. *Reid*, 392 U.S. 286 (1968).

It is also argued by the Government that the Fifth Amendment privilege is not available to the individual defendant Kordel because he made no claim to the seized property and supplied no answers to the interrogatories. With this argument we do not agree. It is clear from the record that Detroit Vital Foods,

Inc., was merely the corporate device through which Kordel sold his products. The Government naturally wanted to cut through the facade and get to Kordel who was the president and dominant personality in the corporation. Although the extent of Kordel's ownership in the corporation is not disclosed by the testimony before us, he evidently was a major stockholder. He therefore had a financial interest in the seized property and certainly, as president of the company, he participated in the decision to answer the interrogatories. Aside from this, if it should be conceded that Kordel was under no coercion to answer the interrogatories, we are of the opinion that Feldten's admissions were not admissible against him under the rule of *Bruton* v. *United States*, 391 U.S. 123 (1968). We conclude therefore that evidence and leads obtained by reason of the interrogatories should have been suppressed against the individual defendants in the criminal case.

We do not hold that a government agency may not institute and prosecute civil proceedings on charges that may also involve a possible criminal proceeding against the same persons. We hold merely that the Government may not use evidence against a defendant in a criminal case which has been coerced from him under penalty of either giving the evidence or suffering a forfeiture of his property.

The judgment is reversed as to the individual defendants, Kordel and Feldten, and the case is remanded for proceedings consistent with this opinion. The judgment is affirmed as to the corporate defendant, Detroit Vital Foods, Inc.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 17639

Filed, Feb. 20, 1969, Carl W. Reuss, Clerk

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

DETROIT VITAL FOODS, INC., LELORD KORDEL, AND ALFRED FELDTEN, DEFENDANTS-APPELLANTS

ORDER

Before: O'SULLIVAN and COMBS, Circuit Judges, and CECIL, Senior Circuit Judge.

The Government's petition for rehearing is granted. The opinion heretofore filed, on July 26, 1968, is modified on its face. The judgment is affirmed as to the corporate defendant, Detroit Vital Foods, Inc., and reversed as to the individual defendants, Lelord Kordel and Alfred Feldten.

Entered by order of the Court:

/s/ Carl W. Reuss
Clerk

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JOHN F. DAVIS, CLER

IN THE

Supreme Court of the United States

October Term, 1968

No. 87

UNITED STATES OF AMERICA,

Petitioner,

against

LELORD KORDEL and ALFRED FELDTEN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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INDEX

	PAGE
Counter-Statement of Question Presented	1
Counter-Statement of Facts	1
Argument	5
CONCLUSION	12

Cases Cited

Boyd, v. U. S., 116 U. S. 616	7, 8, 12
Bruton v. U. S., 391 US 123	11
Communist Party v. U. S., 331 F. 2d 807 (CA DC, 1963) cert. denied 377 U. S. 968	9
Hall Harrigan & Sons v. Enterprise Animal Oil Company, Inc., 18 FR Serv. 33.325, Case 1 (ED Pa., 1953)	7
Mallory v. U. S., 354 US 449	12
McNabb v. U. S., 318 U. S. 332	12
Penn v. Automobile Insurance Company, 27 F. Supp. 336 (DC, Ore., 1939)	7
REA v. US, 350 US 214	12
U. S. v. A. B. Dick, 7 FRD 442 (ND, Ohio)	7
U. S. v. Blue, 384 U. S. 251	7, 12
U. S. v. Bridges, 86 F. Supp. 931 (ND Cal., 1949)	7

PAGE

U. S. v. Cigarette Merchandisers Association, 18 FRD 497 (SDNY) 7

U. S. v. Light, 394 F. 2d 908 (CA 2, 1968) 7

U. S. v. Linen Supply Institute, 18 FRD 452 (SDNY) 7

U. S. v. Lipshitz, 132 F. Supp. 519 (EDNY, 1955) .. 7

U. S. v. Maine Lobsterman's Ass'n., 22 FRD 199 (D. Me) 7

U. S. v. Parrott, 248 F. Supp. 196 (DC, 1965) 7

U. S. v. Thayer, 214 F. Supp. 929 (D. Colo., 1963) .. 7

Wilson v. United States, 221 U. S. 361 ..... 6, 8, 12

Statutes Cited

Fifth Amendment 6, 8, 9, 10, 11

Federal Food, Drug & Cosmetic Act

21 USC 331(a) 2

21 USC 331(k) 2

Other Authority

Rule 33 F. R. Civ. P. 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1291

UNITED STATES OF AMERICA,

Petitioner,

against

LELORD KORDEL and ALFRED FELDTEN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

Counter-Statement of Question Presented

Whether evidence, leads and admissions obtained by compulsory interrogatories directed to a corporation in a civil *in rem* case and answered by an officer of the corporation, should be suppressed in a criminal case against the corporate officers based upon the same facts, where the civil *in rem* and criminal cases went forward on a common front and the officers were the targets of the criminal case.

Counter-Statement of Facts

Prior to the present indictment, a civil *in rem* action was brought by the Government seeking condemnation of various drugs on the ground that they were misbranded

and violative of the Federal Food, Drug & Cosmetic Act, 21 USC 331 (a) and (k). In its conduct of the civil action, the Government served written interrogatories consisting of approximately 1,300 questions seeking comprehensive and detailed information and admissions about the activities of the respondents in connection with the business of Detroit Vital Foods, Inc. of which respondent Kordel was its President, and respondent Feldten its Treasurer. The interrogatories sought information and admissions as to virtually every aspect and element which formed the subject of the present criminal case, such as matters of interstate commerce, labeling, status and relationship of the respondents to Detroit Vital Foods, Inc. and almost every conceivable fact relative to the issue as to whether the drugs were misbranded in violation of the Act.*

Almost simultaneously with the service of the interrogatories, and on or about January 19, 1961, the Government served notice upon respondents and Detroit Vital Foods, Inc., pursuant to Section 305 of the Federal Food & Drug Act, that criminal action was contemplated against them for the same violations of the Act which were the subject of the civil case. On April 7, 1961, a motion was filed in the civil case for a protective order objecting to answering the Government's interrogatories, and to stay the civil proceedings and the filing of answers until after the disposition of the criminal action being planned by the Government, on the ground that through the use of interrogatories, the Government was attempting to obtain information not ordinarily available to it in the criminal case for use in planning and prosecuting the criminal

* The interrogatories and the answers thereto are set forth in defendants' supplemental appendix in the Court below, a copy of which was filed by petitioner as part of the record with the Clerk of this Court. See also pps. 56a-62a of defendants' Appendix also filed by petitioner as part of the record.

action against respondents. The motion was denied by the District Judge who reasoned that respondents would not necessarily be prejudiced since there was no certainty, when or if, a criminal action would be brought. The Court then ordered the filing of the answers to the interrogatories or suffer a forfeiture of the seized property. The civil action was thereafter terminated by a consent decree in which the Government agreed that the entry thereof would not constitute an admission that the Act had been violated.

On August 5, 1963, respondents and their corporation were indicted on the same acts of alleged wrongdoing set forth in the civil action. Respondents moved to quash the indictment and to suppress the evidence and leads obtained by the Government through the use of interrogatories in the civil action on the ground that the use of such evidence and leads constituted "an unconstitutional exercise of inquisitorial authority and was violative of civilized standards of procedures in the administration of criminal justice" (55a). The District Court denied the motion to suppress, but granted a hearing. At the hearing it was developed that the civil case and the investigation of the criminal case had gone forward on a common front; that, indeed, the investigation of the civil and criminal cases were one and the same investigation and part of one file (80a, 81a and 84a); that the answers to the interrogatories had assisted the Government in commencing and prosecuting the criminal case; and that the answers were, in fact, used before the Grand Jury. Further, it was learned that the interrogatories were served at the very time that the FDA had under consideration the bringing of a criminal case for the identical offense (81a); that the interrogatories were prepared by the same person who recommended and whose office

prepared the indictment (102a, and 94a); that the answers to the interrogatories were filed on September 5, 1961 (89a) and a copy thereof immediately sent to the individual who handled the criminal prosecution (92a-93a); and that the decision to prosecute respondents was made by that same individual after he had received the answers to the interrogatories (92a). In short, the hearing established that the Government had filed the interrogatories to obtain answers to assist it in the preparation of the criminal case, had in fact utilized such answers to prepare the criminal case, and that the interrogatories had been prepared and the decision to prosecute made by the very same person!

Indeed, Government agents testified that because of the District Judge's order requiring answers to the interrogatories, the Government would have no difficulty in establishing the element of interstate commerce for the product involved in the criminal case (83a, 84a). In this connection, the Government agent further testified that it was a routine practice of the Food and Drug Administration to utilize discovery in civil cases to obtain evidence for criminal prosecution based upon the same offense (85a).

As far as the proceedings before the Grand Jury is concerned, the hearing further disclosed that an official of the FDA had entered the Grand Jury room armed with the proposed indictment which had been prepared by his FDA associate who had prepared the interrogatories, received the answers and recommended the indictment, and that the FDA official had used the answers to the interrogatories in his statement to the Grand Jury (72a).

Argument

The petition is based upon numerous erroneous assumptions and omissions of material facts and should not be granted.

1. The petition is based on the erroneous premise that the Court of Appeals held that the Food and Drug Administration may not utilize interrogatories in a civil *in rem* action against a corporation and thereafter commence a criminal prosecution for the same alleged illegal activities. The Court of Appeals made no such holding. Indeed, the Court specifically noted that it was not holding that a Government agency may not institute and prosecute civil proceedings on charges that may also involve a possible criminal proceeding against the same persons. The Court specifically noted that its holding was *limited* to the proposition that the Government may not *use* evidence or leads against a defendant in a criminal case which has been obtained by compulsory interrogatories directed to and concerning the target of the criminal case, under penalty of either giving the evidence or suffering a forfeiture of property in the civil case (App. A, p. 26). The Court of Appeals thus merely held that under the facts of the instant case, the Food and Drug Administration had utilized Rule 33 F. R. Civ. P. to obtain admissions, evidence and leads from evidence not otherwise available in a criminal case, to investigate, commence and prosecute a criminal action, and that such evidence, leads and admissions should have been suppressed in the criminal case.

2. The Court of Appeals did not hold that the use of interrogatories in a civil case against a corporation confers immunity from prosecution for the misdeeds of individual officers of the corporation. As above noted, the

Court of Appeals made it clear that there was no immunity involved and that the Governmental agency was not prohibited from filing criminal proceedings against the same persons on the same charges that are involved in a civil proceeding. The government was restricted merely from *utilizing* the information obtained by cumpulsory discovery which is not ordinarily available in the investigation and prosecuton of a criminal case.

The petitioner has ignored the critical facts upon which the reversal by the Court of Appeals of respondents' conviction rested, namely, that the civil case and the investigation of the criminal case had gone forward on a common front; that information obtained in the civil case had been transmitted to those in charge of the criminal investigation; that the recommendation for criminal prosecution had not been made until after the District Judge had ordered the interrogatories to be answered in the civil case; that the interrogatories had been prepared by Mr. Randolph of the Food and Drug Administration in Washington, who also made the initial decision to recommend criminal action against the respondents; and that the answers to the interrogatories had been sent to Mr. Randolph and the indictment prepared in Mr. Randolph's office (App. A pp. 32a-33a). On the basis of these facts, and on the authority of *Wilson* v. *United States,* 221 U. S. 361, the Court of Appeals held that the submission by respondents of answers to the interrogatories violated respondents' Fifth Amendment privilege against self-incrimination since the answers had been signed by a respondent as an officer of the corporation.

3. Petitioner argues that the decision below has an adverse impact in the areas of antitrust, internal revenue and securities regulations where Federal agencies are vested

with the responsibility of administering statutes concerning civil and criminal remedies against offending corporations and individuals.. The fact is, however, that the holding of the Court below is entirely consistent with prior holdings of all Courts which have had occasion, under such statutes, to consider this question. See, for example, *U. S.* v. *Parrott,* 248 F. Supp. 196 (DC, 1965); *U. S.* v. *Lipshitz,* 132 F. Supp. 519 (EDNY, 1955); *U. S.* v. *Thayer,* 214 F. Supp. 929 (D. Colo., 1963); *U. S.* v. *Cigarette Merchandisers Association,* 18 FRD 497 (SDNY); *U. S.* v. *Linen Supply Institute,* 18 FRD 452 (SDNY); *U. S.* v. *Maine Lobsterman's Ass'n.,* 22 FRD 199 (D. Me); *U. S.* v. *A. B. Dick,* 7 FRD 442 (ND, Ohio); *Penn* v. *Automobile Insurance Company,* 27 F. Supp. 336 (DC, Ore., 1939); *U. S.* v. *Bridges,* 86 F. Supp. 931 (ND Cal., 1949); *Hall Harrigan & Sons* v. *Enterprise Animal Oil Company, Inc.,* 18 FR Serv. 33.325, Case 1 (ED Pa., 1953).

In fact, this Court itself noted in *U. S.* v. *Blue,* 384 U. S. 251, that the remedy for obtaining incriminating evidence in a companion civil proceeding is to suppress the evidence and its fruits in the criminal case and not to grant immunity from prosecution. *Cf. U. S.* v. *Light,* 394 F. 2d 908 (CA 2, 1968). In the case at bar, this is precisely the remedy invoked by the Court of Appeals. The foregoing cases and the decision of the Court of Appeals below are founded upon public policy, rooted in historical and settled concepts of anglo-saxon criminal jurisprudence that a prospective defendant should not be required to disclose evidence to sustain the prosecution in a criminal case, or evidence of defense, and that this is a matter not only of privilege against self-incrimination, but of the policy in criminal cases which opposes inquisitorial procedures. *Boyd* v. *U. S.,* 116 U. S. 616.

When viewed in the light of the present record, it is seen that there is nothing in the opinion of the Court of Appeals, or the facts of this case, which suggests that the Court below decided a question in a manner contrary to the decisions of this Court or of other Courts. What is involved here is merely the application of two settled rules of this Court: (a) the rule in *Boyd* v. *U. S., supra,* that a discovery should never be ordered which might tend to convict a party of a crime or to forfeit his property; and (b) the rule in *Wilson* v. *U. S., supra,* that an officer of a corporation does not lose his personal privilege against self-incrimination under the Fifth Amendment by reason of his corporate position and may not be required on behalf of the corporation to utter a single self-incriminating word. Nothing in the holding of the Court below restricts the Government's right to use discovery in a civil case nor to bring a companion criminal action based upon the same facts. What is prohibited is the use of evidence and leads in a criminal case obtained by a deliberate and calculated utilization of compulsory discovery in a civil case involving the same facts and parties.

4. Petitioner argues that the decision below is in conflict with decisions of other Federal Courts of Appeals as to the question of whether the submission of interrogatories to the corporation compelled the individual respondents to incriminate themselves or suffer forfeiture of their property. None of the cases cited on pages 10 and 11 of the petition deal with the issue involved herein, namely, whether incriminating evidence obtained by compulsory discovery should be suppressed in a criminal case based upon the same facts. Rather, in those cases, the issue was merely whether the corporation should or could appoint an agent to furnish the requested information without fear of self-incrimination. Those cases did not deal

with the issue here presented to the Court of Appeals, namely, whether evidence, leads and admissions obtained via compulsory discovery, over respondents' objection, and at a time when respondents were the targets of a criminal prosecution for the identical factual matters sought to be elicited by the interrogatories, should have been suppressed in the criminal case. Nor did those cases deal with the present situation where an officer of the corporation, over objection, had in fact answered interrogatories which provided evidence and leads necessary to commence and prosecute a criminal case. Moreover, here, the record contains absolutely no evidence that someone other than respondents Feldten or Kordel were available to answer the extremely broad and searching interrogatories.

Even if the corporation was duty bound to find someone willing, even if not legally bound, to act for it in answering the interrogatories, there is no proof that such a volunteer was available. Since the burden of proving that a volunteer was available rests upon the Government, *Communist Party* v. *U. S.*, 331 F. 2d 807, 815 (CA DC, 1963), *cert. denied,* 377 US 968, petitioner is in no position to argue that respondents were not coerced in supplying answers to the interrogatories.*

As the Court of Appeals properly pointed out, in that posture, respondents were faced with the alternatives of refusing to answer after ordered to do so, which would have resulted in the forfeiture of the seized property, providing false answers and thereby subjecting themselves to possible prosecution for perjury, or supplying the required information and thereby incriminating themselves in the contemplated criminal action. In selecting the third alterna-

* The interrogatories were specifically related to Feldten and Kordel and logically, only they would know and could provide the answers.

tive, no waiver of their Fifth Amendment privilege against self-incrimination may be inferred. In order to harmonize the rights of all parties, the Court of Appeals properly held that the only effective remedy was to suppress the evidence and leads thus obtained.

5. Petitioner erroneously argues that the submission of answers to the interrogatories constituted a waiver of respondents' Fifth Amendment privilege against self-incrimination and an uncoerced submission of information. The fact is, however, that a timely motion for a protective order against being required to answer the incriminating interrogatories was made—the best possible proof that respondents did not intend to waive and indeed, sought to safeguard their self-incrimination privilege. Moreover, the motion was denied by the District Court on the ground that there was no certainty that the threatened criminal prosecution would ever be brought. Implicit in the District Court's ruling, therefore, was the underlying concern against the use of the answers in the criminal case if it should be brought. Further, after being ordered to answer the interrogatories, additional objections to the broadness of certain of the interrogatories were again made and, again, overruled.

6. Petitioner argues that the interrogatories, as such, were not introduced as evidence in the criminal case. The fact is, however, that the answers to the interrogatories were used before the Grand Jury and that the proof of the crucial element of interstate commerce in the criminal case was provided by the answers to the interrogatories. Further, the Court of Appeals found that the Government had not proved that evidence and leads obtained thereby through the interrogatories had not been used to secure the indictment or evidence submitted at the trial.

While it is true that respondent Kordel did not sign the interrogatories, the Court of Appeals correctly pointed out that Kordel was under the same compulsion, by reason of the peculiar circumstances of the instant case, to provide the answers. Here, as the Court noted, the interrogatories were for the most part requests for admissions by and information concerning respondent Kordel and dealt with the personal activities of Kordel with respect to the matters directly under scrutiny in the contemplated criminal action. Moreover, the Court of Appeals noted that the admissions by Feldten were not useable against Kordel under the rule of *Bruton* v. *U. S.*, 391 US 123.*

7. Petitioner further suggests that the interrogatories at issue were not unreasonably broad and sought only information directly pertinent to the civil case. The Court of Appeals made short shrift of this contention by noting that the interrogatories were far broader than would ordinarily be needed in a civil case, that they were directed specifically at the activities of respondents Kordel and Feldten, principal defendants in the criminal case, that they requested numerous admissions, and, in short, they were unbelievably comprehensive and detailed—more than 1,300 questions were asked. In this connection, the question of good faith of the Government in propounding the interrogatories, while open to serious question, is not the basic issue. The issue here is whether respondents were compelled to testify against themselves. The Court below held that a violation of the Fifth Amendment cannot be

* While it is true that the interrogatories and answers as such were not physically introduced at the trial, the fact is that the information obtained therefrom was used to investigate and prosecute defendants and provided evidence which formed the basis of numerous questions and leads which motivated the calling of witnesses pertaining to crucial elements of essential proof, i.e. interstate commerce. In addition the answers were physically used in the proceedings before the Grand Jury.

condoned merely because the agents of the Government may have acted in good faith.

8. Here, there is involved a shocking example of agency indifference to abusive inquisitorial authority and an actual misuse of the discovery procedures available under the Federal Rules of Civil Procedure. The holding and rationale of the Court of Appeals is entirely consistent with the holdings of this Court recognizing and invoking exclusionary rules where evidence has been gained in violation of an accused rights under the Constitution, Federal Statutes or Federal Rules of Procedure. *Boyd* v. *U. S., supra, Wilson* v. *U. S., supra, Blue* v. *U. S., supra, Mallory* v. *U. S.,* 354 US 449, *McNabb* v. *U. S.,* 318 U. S. 332, *REA* v. *US* 350 US 214.

CONCLUSION

It is, therefore, respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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Dated: May, 1969

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Summary of argument	12
Argument	16
I. Submission of the interrogatories to Detroit Vital Foods, Inc., did not compel respondents to furnish any answers thereto and thus did not violate their privilege against self-incrimination	17
II. There was no violation of due process by the use of interrogatories in the civil suit	24
A. The bringing of a civil suit does not bar criminal prosecution or the use of evidence obtained in the civil suit unless there is a showing of bad faith or unnecessary injury to the defense	25
B. There was no unfairness in the use of interrogatories in this case	37
Conclusion	41
Appendix	43

CITATIONS

Cases:	
Abel v. *United States*, 362 U.S. 217	11, 30, 32
Beard v. *N.Y. Central R. Co.*, 20 F.R.D. 607	31
Bruton v. *United States*, 391 U.S. 123	12, 24
Campbell Painting Co. v. *Reid*, 392 U.S. 286	22
Communist Party v. *United States*, 331 F. 2d 807, certiorari denied, 377 U.S. 968	20, 21
D'Ippolito v. *American Oil Co.*, 272 F. Supp. 310	31
Ewing & Mytinger v. *Casselberry*, 339 U.S. 594	26
Gouled v. *United States*, 255 U.S. 298	32
Harrington v. *California*, No. 750, O.T., 1968, decided June 2, 1969	24

360-005—69——1

Cases—Continued

	Page
Hickman v. *Taylor*, 329 U.S. 495	19, 21, 22
Kordel v. *United States*, 335 U.S. 345	3
Luey v. *Sterling Drug, Inc.*, 240 F. Supp. 632	20
Marchetti v. *United States*, 390 U.S. 39	22
Nature Food Centres, Inc. v. *United States*, 310 F. 2d 67, certiorari denied, 371 U.S. 968	4, 30
Oklahoma Press Publishing Co. v. *Walling*, 327 U.S. 186	22
Rogers v. *United States*, 340 U.S. 367	22
Silver v. *McCamey*, 221 F. 2d 873	33
Standard Sanitary Mfg. Co. v. *United States*, 226 U.S. 20	29, 31
United States v. *American Radiator & Standard Sanitary Corp.*, 388 F. 2d 201	31
United States v. *Article of Drug*, 43 F.R.D. 181	19, 20, 30
United States v. *Article of Drug* * * * *B-Complex Cholinos Capsules*, 362 F. 2d 923	30
United States v. *Detroit Vital Foods, Inc.*, 330 F. 2d 78, certiorari denied, 379 U.S. 832	5
United States v. *88 Cases* * * * *Bireley's Orange Beverage*, 5 F.R.D. 503	18
United States v. *5 Cases* * * * *"Figlia Mia Brand"*, 179 F. 2d 519, certiorari denied, 339 U.S. 963	18
United States v. *48 Jars* * * * , 23 F.R.D. 192	19, 20
United States v. *42 Jars* * * * *Bee Royale Capsules*, 162 F. Supp. 944, affirmed, 264 F. 2d 666	19
United States v. *Jaskiewicz*, 278 F. Supp. 525	33
United States v. *Light*, 394 F. 2d 908	32
United States v. *Monia*, 317 U.S. 424	22
United States v. *Parrott*, 248 F. Supp. 196	16, 32
United States v. *Parrott*, S.D.N.Y., No. 66 Cr. 243, decided February 14, 1969	32
United States v. *Pennsalt Chemicals Corp.*, 260 F. Supp. 171	31
United States v. *Procter and Gamble Co.*, 356 U.S. 677	31
United States v. *Sclafani*, 265 F. 2d 408, certiorari denied, 360 U.S. 918	32
United States v. *Simon*, 373 F. 2d 649, certiorari granted *sub nom. Simon* v. *Wharton*, 386 U.S. 1030, vacated as moot, 389 U.S. 425	31, 34

Cases—Continued Page
United States v. *Squeri*, 398 F. 2d 785 32
United States v. *39 Cases * * * Mich. Brand Korleen Tablets*, 192 F. Supp. 51 5
United States v. *3963 Bottles * * * Enerjol*, 265 F. 2d 332, certiorari denied, 360 U.S. 931 ..... 19, 21
United States v. *White*, 322 U.S. 694 23
Wilson v. *United States*, 221 U.S. 361 23
Constitution, statutes and rules:
Fifth Amendment 2, 6, 8, 11, 12, 13, 16, 17, 20, 22, 23, 37
Sixth Amendment 24
Subversive Activities Control Act 21
18 U.S.C. 4208(a)(2) 2
21 U.S.C. 331 3
21 U.S.C. 331(a), (k) 2
21 U.S.C. 333 3
21 U.S.C. 334 ..... 4, 14, 18, 25
21 U.S.C. 335 ..... 5, 6, 15, 38
21 U.S.C. 352(f) 4, 39
28 U.S.C. 1918 3
Rule 30(b), Federal Rules of Civil Procedure 39
Rule 33, Federal Rules of Civil Procedure, based on former Equity Rule 58 ..... 2, 5, 13, 18, 19, 39
Rule 81(a)(2), Federal Rules of Civil Procedure 18
Supplemental Rule A, Federal Rules of Civil Procedure 18
Supplemental Rule C, Federal Rules of Civil Procedure 18

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 87

UNITED STATES OF AMERICA, PETITIONER

v.

LELORD KORDEL AND ALFRED FELDTEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The initial opinion of the court of appeals (App. 353–360) is not reported. The opinion of the court of appeals on rehearing (App. 362–370) is reported at 407 F. 2d 570.

JURISDICTION

The initial judgment of the court of appeals (App. 353–360) was entered on July 26, 1968, and was modified on petition for rehearing on February 20, 1969 (App. 361–370). Mr. Justice Stewart extended the government's time for filing a petition for a writ of certiorari to April 21, 1969. The petition was filed on that date and was granted on June 2, 1969. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a prosecution for violating the food and drug laws, respondents' privilege against self-incrimination or other Fifth Amendment rights were violated by the fact that the government, in a prior civil proceeding to condemn the drugs owned by the corporation of which respondents were officers, had directed interrogatories to the corporation pursuant to Rule 33, F.R. Civ. P., with respect to respondents' activities in connection with the drugs.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, respondents and their corporate employer, Detroit Vital Foods, Inc., were convicted on five counts of an indictment charging them with introducing into interstate commerce certain misbranded drugs (Frutex wafers, Lecigen granules, Aminex and Nutri-Time tablets) and with performing acts which resulted in the misbranding of the drug Korleen while it was being held for sale after shipment in interstate commerce (21 U.S.C. 331(a), (k)). On January 19, 1966, respondent Kordel was sentenced to imprisonment for two years, subject to the parole eligibility provisions of 18 U.S.C. 4208(a)(2), and was fined $10,000; respondent Feldten was sentenced to imprisonment for one year, suspended to thirty days with three years' probation, and was fined $2,000; and the corporation

was fined $5,000 and directed to pay the costs of prosecution under 28 U.S.C. 1918.[1]

Detroit Vital Foods, Inc., is a Michigan corporation with its headquarters in Detroit. Respondent Kordel was its president and respondent Feldten its treasurer. Kordel was the author of numerous books and leaflets promoting the products of Detroit Vital Foods, Inc. As the court of appeals found, the evidence showed that during the years 1959–1961 Kordel traveled across the country delivering lectures in various cities which were advertised and open to the public. The books and lectures were discussions of how various physical ailments could be alleviated by the intake of certain foods and food elements. The best sources of these foods and food elements, it was said, were the products offered for sale by respondents. The company's products were sold at booths in or near the lecture halls and were also available in health food stores generally. Feldten made no speeches but acted as Kordel's assistant. He sold the products at lectures and took orders for products to be shipped from Detroit (App. 362–363).

The essence of the criminal charges against respondents was that, as to some of the products, certain books and leaflets written by Kordel constituted part of the labeling and contained false and misleading statements, and that, as to all counts on

[1] Respondent Feldten and the corporation were found guilty of misdemeanors as first offenders. Respondent Kordel was found guilty of felonies by virtue of his prior conviction for violation of Section 331. See 21 U.S.C. 333; and see, affirming the previous conviction, *Kordel* v. *United States*, 335 U.S. 345.

which respondents were convicted,[2] the products (claimed by defendants to be merely food supplements) were in fact drugs intended by defendants to be used for the prevention and treatment of various diseases and conditions (see App. 363–364) and the labeling for them was deficient under 21 U.S.C. 352(*f*) in that it failed to set forth adequate directions for use (*e.g.*, the dosage, frequency and duration of administration of each drug and the conditions for which its use was intended).[3] The government proved Kordel's representations about the drugs principally by introducing tape recordings of his public lectures.

1. The indictment in this case was returned in August 1963. On June 9, 1960, the government had filed a libel[4] under 21 U.S.C. 334 seeking to condemn quantities of Korleen tablets and Frutex wafers on the ground that they had been misbranded while held for sale after shipment in interstate commerce. The corporate claimant, Detroit Vital Foods, Inc., filed an answer denying the material allegations of the libel (App. 302–303). During the course of the civil suit, which terminated in a consent decree of condemnation,[5] the government served interrogatories upon the

[2] Respondents were convicted on counts 4, 8, 9, 10, and 11 (App. 3) of the original twelve-count indictment. Six of the twelve counts were dismissed prior to trial. A seventh count was dismissed during the trial.

[3] An example of an almost identical prosecution is *Nature Food Centres, Inc.* v. *United States*, 310 F. 2d 67 (C.A. 1), certiorari denied, 371 U.S. 968.

[4] The libel was amended on January 23, 1961.

[5] The claimant reserved the right to appeal the jurisdictional question pertaining to Korleen tablets, but the requirements of interstate commerce in their production were found

claimant pursuant to Rule 33, F.R. Civ. P. The interrogatories (set forth at App. 304–328) were filed on January 9, 1961, and April 10, 1961, and sought detailed information, *inter alia,* about the labeling, testing, manufacture and composition of Korleen and Frutex and about respondent Kordel's oral representations concerning the efficacy of these drugs made during the public lectures he gave at Detroit between March 29 and April 8, 1960.[6] In the course of the civil action the claimant also served extensive interrogatories upon the government, which were answered in January 1961 (see App. 337–338).

In April 1961 Detroit Vital Foods, Inc., moved to stay the libel action on the ground that criminal prosecution was being considered by the government. The motion (App. 329–336) stated that in late January 1961, shortly after service of the initial interrogatories by the government, the company had received a notice of hearing under 21 U.S.C. 335,[7] indicating that

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to have been met. See *United States* v. *Detroit Vital Foods, Inc.*, 330 F. 2d 78 (C.A. 6), certiorari denied, 379 U.S. 832; see, also, *United States* v. *39 Cases* * * * *Mich. Brand Korleen Tablets*, 192 F. Supp. 51 (E.D.Mich.).

[6] One of the counts of the instant indictment on which respondents were convicted (Count 4) was based on this lecture-promotion. The other counts were based on lecture-promotions of March 7–17, 1960, given at New York, and April 4–14, 1961, given at Detroit.

[7] 21 U.S.C. 335 provides that: "Before any violation of this chapter is reported by the Secretary to any United States Attorney for institution of a criminal proceeding, the person against whom such proceeding is contemplated shall be given appropriate notice and an opportunity to present his views, either orally or in writing, with regard to such contemplated proceeding." Two additional notices of hearing, concerning pos-

criminal prosecution of the corporation and respondents was contemplated, in part for the same conduct that was the subject of the libel. The motion asked that, pursuant to the court's discretionary power,[*] the claimant's time to respond to the government's interrogatories be extended until after final disposition of the criminal case, since responses to the interrogatories would disclose the basis of the claimant's defense in the criminal case. On June 21, 1961, the district judge denied the motion for a stay, on the ground that there was no certainty when or whether a criminal prosecution would be brought, and that the corporation was not prejudiced by being required to answer the interrogatories, since the government would in any event obtain information pertinent to a criminal case from the trial of the libel action itself (see opinion of Judge Levin, at App. 337-339). The court ordered claimant to answer the interrogatories within thirty days or file specific objections thereto within twenty days.

On September 5, 1961, claimant filed answers to some of the interrogatories. Respondent Feldten subscribed to the answers as vice president of the claimant and stated that the answers were true to the best of his knowledge and belief, but that not all of the answers were known to him personally (App. 345-

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sible violations involving the other two (later) lecture-promotions underlying the present prosecution, were issued to the company prior to the reporting of the matter to the United States Attorney in June 1962. Hearings on these Section 335 notices were held in New York (see App. 156–158, 205–207).

[*] Reliance on the Fifth Amendment privilege against self-incrimination was expressly eschewed.

348). The claimant filed objections to several unanswered interrogatories on September 14, 1961 (App. 340-343). After a pre-trial conference in May 1962, the trial judge sustained the objections to certain of the interrogatories and indicated that the government should review the remaining unanswered interrogatories with a view to their possible withdrawal, since the judge did not regard many of them as fundamental to the issues. On June 14, 1962, the government advised the district court that it was withdrawing about a dozen of the interrogatories,[9] but that it was insisting on certain others. The government also pointed out that, although nine months had passed, claimant had not yet furnished information in response to several interrogatories as to which the information had been promised "shortly" in claimant's initial answers to the interrogatories. On September 13, 1962, the district judge overruled the objections to each of the interrogatories upon which the government had insisted[10] and directed claimant to respond to the interrogatories as to which it had promised that information would be forthcoming (App. 344). On September 24, 1962, claimant, by re-

[9] Withdrawn were orginal interrogatories numbered 16(b), 16(c), 27, 32, 34, 37, 44, 50, and 59, and supplemental interrogatories numbered 14, 16, 19, and 20.

[10] These were original interrogatories numbered 18, 20-23, 26, 30, 35, 52, 57, and 60. They concerned requests for admissions (1) that respondent Kordel had made certain representations in his lectures, (2) that the products did not have the curative qualities ascribed to them, and (3) that the labeling of Korleen was deficient.

spondent Feldten as before, submitted additional answers to the interrogatories in compliance with the judge's order (App. 349–352).

Claimant submitted, in all, some eight or nine pages of answers to the interrogatories. Claimant alleged "no knowledge" of the facts as to whether certain leaflets containing representations about the products Korleen and Frutex were distributed to the public at respondent Kordel's lectures. It denied that Korleen tablets and Frutex were intended, or were represented by Kordel at the lectures, to be an adequate cure for various diseases, claiming instead that these products were sold only as "food supplements" (App. 346, 349). At no time did claimant or either respondent lodge an objection to any interrogatory on Fifth Amendment grounds. Thereafter the consent decree which terminated the libel action (save for the jurisdictional issue) was entered on November 29, 1962.

2. The Food and Drug Administration referred the matter to the Department of Justice with a recommendation for prosecution on June 13, 1962. An indictment was returned against respondents and the corporation in August 1963. In March 1965, they moved in the criminal case to suppress "any evidence or leads therefrom obtained by the Federal Government in compulsory discovery proceedings instituted by the Government" in the libel action (App. 46). They contended that the use of such evidence and leads constituted "an unconstitutional exercise of inquisitorial authority, and is violative of civilized standards of procedures in the administration of criminal justice" (*ibid.*). In the alternative, the motion requested a

hearing to determine the government's good faith and motive in commencing the civil action and serving the interrogatories. The district court granted the request for a hearing (App. 52–57).

At the three-day hearing which followed, the Assistant United States Attorney and the Detroit and Washington, D.C., representatives of the Food and Drug Administration who were in charge of the civil and criminal cases involved herein testified. The record of this hearing showed, as the district court recognized, that, at the time the civil case was filed, the Food and Drug Administration had evidence to establish *all* of the elements of the criminal violations (App. 154–155, 208–210, 212, 232, 287). The principal purpose of submitting the interrogatories was to obtain admissions to all or many of the facts as to which proof at trial would otherwise be required and thus to narrow the issues in the civil suit or to lay the foundation for a motion for summary judgment. An additional purpose was to demonstrate to the claimant the insubstantiality of its case and thus possibly precipitate a consent decree (App. 224, 249–250). One witness further testified that the civil action to seize the drugs had to be commenced "promptly" (and thus could not await a determination by the agency whether to recommend criminal proceedings) because otherwise the merchandise would be distributed, and the harm to the public accomplished (App. 227). Prior to the decision to recommend criminal prosecution, information pertaining to both the civil and possible criminal cases was kept in a single agency file and both cases were under the

overall supervision of a single representative, Mr. Goodrich, General Counsel of the Food and Drug Administration. No decision with regard to recommending criminal prosecution had been made by the agency when the civil case was commenced, or when the interrogatories were filed (App. 176–177, 188, 190–192, 236). The issuance of the notice of hearing in late January 1961 (after the initial interrogatories were filed) announcing that the Food and Drug Administration was "considering" criminal prosecution of respondents and the corporation for their activities in connection with the drugs involved in the civil suit did not reflect a prior decision to recommend such prosecution, and it was testified that less than ten percent of cases in which such notices of hearing are sent out by the Food and Drug Administration ever result in the bringing of formal criminal charges against the recipient (App. 223–225). Mr. Randolph of the Food and Drug Administration first recommended to its General Counsel that the case be sent to the Department of Justice with a recommendation for criminal prosecution on August 31, 1961, *before* the corporation had filed its initial answers to the government's interrogatories. Mr. Randolph was then aware of Judge Levin's ruling denying claimant's motion to postpone the time for responding to the interrogatories, but he testified that he "knew that irrespective of the answers, it would have no influence on [his] recommendation for prosecution" (App. 229–230, 236).

At the conclusion of the hearing, the district court found that the governmental decisions to commence

the civil action and to submit the interrogatories to the claimant had been made in good faith and that there was then no certainty that a criminal prosecution would be brought. Accordingly, the court denied the motion to suppress on the authority of *Abel* v. *United States*, 362 U.S. 217 (App. 285–288).

3. On July 26, 1968, the court of appeals for the Sixth Circuit reversed the convictions of all the defendants on the ground that they had been denied the protection afforded by the Fifth Amendment. The government filed a petition for rehearing which was granted. On February 20, 1969, the court of appeals modified its opinion so as to affirm the conviction of the corporate defendant,[11] but adhered to its judgment reversing the convictions of respondents Kordel and Feldten.

Although none of the answers to the interrogatories had been introduced into evidence in the criminal case, the court of appeals found that the government had not proved that information and leads obtained thereby had not been utilized in securing the indictment or obtaining evidence admitted at the trial (App. 368–369). The court held that the good faith of the government in using the interrogatories was irrelevant, since, by requiring the corporation to answer the interrogatories, the government had compelled the individual respondents to incriminate themselves. The court purported to recognize that the privilege against self-

[11] This Court denied the corporation's petition for a writ of certiorari (No. 1285, O.T., 1968) from that judgment on June 2, 1969, the day on which it granted the government's petition for a writ of certiorari as to the respondents herein.

incrimination is available only to natural persons and not to a corporation. It held, nevertheless, that the Fifth Amendment privilege was available to both Kordel and Feldten even though neither had interposed any claim to the seized drugs, neither was a party to the civil action, and Kordel had supplied no answers to the interrogatories (App. 365–370). The court held in the alternative with respect to Kordel that Feldten's answers to the interrogatories, which it characterized as "admissions," violated the rule of *Bruton* v. *United States,* 391 U.S. 123 (App. 370).

SUMMARY OF ARGUMENT

I

The court of appeals erred in reversing respondents' convictions on the ground that their privilege against self-incrimination had been violated by the interrogatories addressed to the corporation of which they were officers—even though neither respondent had been a party to the civil action in which the interrogatories were used, neither had interposed a claim to the drug, neither had claimed the privilege against self-incrimination when respondent Feldten answered the interrogatories on behalf of the corporation, and neither made a showing that the answers to the interrogatories led to any evidence used in the criminal case. The court failed to give adequate consideration to the law surrounding the use of interrogatories and to the legal consequences that flow from doing business in corporate form.

Respondents were under no compulsion to provide incriminating information in response to the inter-

rogatories. Under Rule 33, F.R. Civ. P., a person who answers interrogatories on behalf of a corporation may invoke his privilege against self-incrimination as to any or all of the interrogatories. The sole duty imposed under Rule 33 is upon the party served with interrogatories to "furnish such information as is available to the party." Thus, the only person compelled to provide information in response to the interrogatories was the corporation, which had no privilege against self-incrimination and could not invoke that of any other person. Neither respondent Feldten, who answered the interrogatories, nor respondent Kordel, who did not, ever invoked the privilege against self-incrimination as to any interrogatory. Nor did either of them attempt to show that no other officer, employee or agent of the corporation could answer the interrogatories.

There was no compulsion on respondents stemming from the fact that, if the corporation failed to answer the interrogatories, it might be liable to a default judgment. The drugs which were at stake in the condemnation suit were the property of the corporation, which was the sole claimant in the civil proceeding. Respondents asserted no personal property interest in the drugs. Whatever respondents' financial relationship to the corporation, they could not, under this Court's decisions, utilize the corporate form of doing business and still claim an individual interest in its property for the purpose of invoking the Fifth Amendment privilege against self-incrimination.

360-005—69——3

II

Although couched in terms of the privilege against self-incrimination, the opinion below suggests more generally that it was basically unfair for the government to insist on answers to interrogatories in the civil proceeding at a time when the possibility of bringing a criminal prosecution against respondents and the corporation based upon the same activities was under consideration. We do not deny the need for care in situations where government agencies, in fulfilling their statutory responsibilities to safeguard the public, determine that both civil and criminal remedies are appropriate against a corporation or individuals. We believe, however, that their ability to protect the public would be unjustifiably hampered by the *per se* rule applied by the court below, which would mean that the mere fact that the government proceeds with a civil suit against a corporation and uses the normal processes of civil discovery therein would automatically give the individual officers of the corporation immunity from prosecution for their related conduct unless the government could affirmatively show that no information obtained in the civil action led in any way to evidence in the criminal case.

There was no unfairness in this case. The civil action was necessary to protect the public from distribution of the mislabeled drugs, and it was important to bring the suit promptly to judgment so that, in accordance with 21 U.S.C. 334, the Food and Drug Administration would be able to proceed by multiple seizures to prevent the corporation from

marketing additional quantities of the mislabeled drugs. The interrogatories were a valid device to expedite the civil suit, by seeking admissions which would prepare the groundwork for a motion for summary judgment. As the district court found, the civil action was commenced, and the interrogatories were submitted, in entire good faith. This case does not present the situation where the government has attempted to use a proceeding solely as a means to obtain evidence for a different action.

There was, moreover, no concealment of the government's intention to prosecute in this case. The Food and Drug Administration, shortly after service of the initial interrogatories, sent the corporation a notice, pursuant to 21 U.S.C. 335, that criminal prosecution of respondents and the corporation was being considered in relation to the activities at issue in the condemnation suit. Respondents were thus in a position to judge whether answers to the interrogatories might tend to incriminate them. Moreover, it is clear that the government was not seeking to get incriminating information as to respondents through the interrogatories, which were not introduced in the criminal trial. Prior to service of the interrogatories, the government already had evidence to establish all of the elements of the criminal violations. The interrogatories were intended solely to get the corporation to admit certain of those facts so that the government could move for summary judgment, or negotiate a consent decree, in the civil suit.

The court of appeals was, therefore, unwarranted in reversing respondents' convictions.

ARGUMENT

The precise holding of the court below is that respondents' individual privilege against self-incrimination was violated because the corporation was required to answer interrogatories in a civil proceeding for forfeiture of the drugs alleged to have been mislabeled. We address ourselves first to this ruling, arguing that the individual respondents were in no sense compelled to incriminate themselves by virtue of the interrogatories, and that their Fifth Amendment privilege against compulsory self-incrimination was therefore not violated.

There is, however, another, not fully articulated, rationale that arguably underlies the decision below. The court of appeals—notwithstanding its express reliance on the privilege against self-incrimination and its consequent affirmance of the corporation's conviction—seemed to be of the view that the government's use of discovery procedures in a civil suit against a corporation involving matters as to which criminal prosecution is contemplated or pending against the corporation or its officers is so inherently unfair that, even though the government makes no apparent use of the interrogatories in the criminal action, and even though the criminal defendants make no showing that the answers to the interrogatories prejudiced them, the government is under an initial obligation to establish that it obtained no leads from the interrogatories. This underlying due process basis for the court's holding is suggested, in part, by the citation in the opinion (App. 367) of *United States* v. *Parrott*,

248 F. Supp. 196 (D.D.C.), and related cases, which focus, not primarily on the Fifth Amendment privilege, but more generally on the propriety of commingling parallel civil and criminal inquiries. Pertinent also is the fact that respondents' arguments in the courts below were cast principally in due process terms (see Resp. Br. in court of appeals, p. 17). Although we disagree with respondents' conclusions as to this case, we agree that the due process clause provides an appropriate framework for deciding issues which arise where an agency vested with responsibility for administering both civil and criminal statutes decides in the public interest to proceed civilly pending a determination as to whether criminal prosecution should also be sought. Accordingly, after dealing with the issue of self-incrimination, we shall turn to these due process considerations.

I. SUBMISSION OF THE INTERROGATORIES TO DETROIT VITAL FOODS, INC., DID NOT COMPEL RESPONDENTS TO FURNISH ANY ANSWERS THERETO AND THUS DID NOT VIOLATE THEIR PRIVILEGE AGAINST SELF-INCRIMINATION

In holding that respondents' privilege against self-incrimination was violated by the government's submission of interrogatories to Detroit Vital Foods, Inc., the court below said that respondents had been placed in the position of either answering the interrogatories or suffering almost certain forfeiture of "their" property—a choice which, in the court's view, amounted to compulsion prohibited by the Fifth Amendment (App. 365). We believe there are critical deficiencies in this analysis.

1. In holding that submission of the interrogatories to the corporation had the effect of compelling respondents to answer them, the court below failed to take into consideration the law surrounding the use of interrogatories under Rule 33 of the Federal Rules of Civil Procedure.[12] There is no requirement under Rule 33 that the person answering interrogatories on behalf of a corporation have personal knowledge of the truth of the answers furnished. Respondent Kordel did not answer the interrogatories at all. Respondent Feldten, who answered for the corporation, expressly disclaimed having personal knowledge (see *supra,* p. 6). Thus, as to neither respondent were the answers to the interrogatories testimony which could be used against the individual respondents as admissions against interest.

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[12] Rule 81(a)(2), F. R. Civ. P., which was in effect at the time of the civil action herein, provided that in cases of "forfeiture of property for violation of a statute of the United States" the Federal Rules of Civil Procedure were applicable in pre-appeal proceedings "to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity." Federal Rule of Civil Procedure 33, providing for the use of interrogatories by either party in a civil action, was specifically based on former Equity Rule 58. The Federal Rules were consistently held to apply to forfeiture actions under 21 U.S.C. 334. See, *e.g., United States* v. *88 Cases* * * * *Bireley's Orange Beverage,* 5 F.R.D. 503 (D. N.J.); *United States* v. *5 Cases* * * * *"Figlia Mia Brand,"* 179 F. 2d 519, 522 (C.A. 2), certiorari denied, 339 U.S. 963. Rule 81(a)(2), F. R. Civ. P., insofar as here pertinent, was abolished effective July 1, 1966. The Federal Rules of Civil Procedure relating to interrogatories continue, however, to be applicable to civil forfeiture actions under new Supplemental Rule A. See, also, Supplemental Rule C.

Similarly, there is no requirement that the interrogatories be answered by an officer or agent of the corporation who might incriminate himself by doing so. Like any other privilege or objection, the privilege against self-incrimination may be invoked by an individual designated to answer interrogatories on behalf of a corporation, and, if the claim of privilege is upheld, the individual concerned need not answer. See *United States* v. *42 Jars * * * Bee Royale Capsules,* 162 F. Supp. 944, 946 (D. N.J.), affirmed, 264 F. 2d 666 (C.A. 3); see, also, *Hickman* v. *Taylor,* 329 U.S. 495. It is true that invocation of the privilege by one or more agents or officers of the corporation designated to answer interrogatories does not end the corporation's obligation to supply the answers. The cases unanimously hold, in accordance with the clear language of Rule 33,[13] that submission of interrogatories to a corporation imposes a duty on the corporation "to appoint an agent who could, without fear of self-incrimination, furnish such requested information as was available to the corporation." *United States* v. *3963 Bottles * * * Enerjol,* 265 F. 2d 332, 336 (C.A. 7), certiorari denied, 360 U.S. 931; *United States* v. *42 Jars * * * Bee Royale Capsules,* 264 F. 2d 666, 670 (C.A. 3); *United States* v. *48 Jars * * *,* 23 F.R.D. 192, 193–196 (D. D.C.); *United States* v. *Article of Drug * * *,* 43 F.R.D. 181, 186–187 (D. Del.). Even if

[13] The Rule provides: "Any party may serve upon any adverse party written interrogatories to be answered by the party served, or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, *who shall furnish such information as is available to the party*" (emphasis added).

no ordinary agent or officer of the corporation is available to provide the other party with answers, the corporation remains under a duty to appoint some agent, such as its attorney, to answer the interrogatories. *United States* v. *48 Jars, supra; United States* v. *Article of Drug, supra.* The obligation, however, is solely that of the corporation; there is no compulsion on any officer or agent thereof to furnish the information sought. Thus neither of the respondents was "compelled" to give any testimony.

In their brief in opposition to the petition for certiorari, respondents suggested that they were in practical effect compelled to answer the interrogatories since they were the only persons in the corporation with knowledge of the matters to which the interrogatories related, and thus the information had to come from them. This argument is not available to them, however, because they never attempted to make a showing in either the civil action or the courts below that no officer, employee or other agent of the corporation could answer the interrogatories without incriminating himself.[14] See *Luey* v. *Sterling Drug, Inc.*, 240 F. Supp. 632 (W.D. Mich.); compare the special situations in *Hickman* v. *Taylor*, 329 U.S. 495, 511–512, and *Communist Party* v. *United States*, 331 F. 2d 807, 814 (C.A.D.C.), certiorari denied, 377 U.S. 968. Relying upon the latter case, respondents attempted, in their

[14] Respondents thus waived any right to claim their Fifth Amendment privilege on the basis of a contention that they were the sole corporate repositories of the information sought (see *infra*, p. 22).

brief in opposition, to shift to the government the burden of proving the existence of a suitable officer of the corporation who could answer the interrogatories without risk of self-incrimination. The *Communist Party* case does not, however, support respondents' contention. There the question was the validity of the Party's conviction for failing to register under the Subversive Activities Control Act and the court held that it was an element of the crime to show that there was a person who could have registered the Party without substantial risk of self-incrimination. The court held that the principles of the *Enerjol* (265 F. 2d 332) and *Bee Royale* (264 F. 2d 666) cases cited *supra*, that a corporation served with interrogatories is obligated if necessary to appoint an agent who could furnish the information sought, could not be applied to the Communist Party, in view of the fact that mere association with the Party was incriminating. Even though the court recognized that the Party was more likely than the government to know whether a volunteer was available, the court placed the burden of proof as to this issue on the government, since requiring the Party to make the showing would in all likelihood require a member of the Party to waive his privilege and testify as to his efforts to find a volunteer (331 F. 2d at 814). There is no reason to apply any such rule here.[13]

[13] *Hickman* v. *Taylor*, *supra*, illustrates another exception to the general rule not applicable here. There the interrogatories sought information as to the work products of an adverse

Moreover, it is conclusive against respondents' claims of Fifth Amendment privilege that neither respondent Feldten, who answered the interrogatories, nor respondent Kordel, who did not, ever invoked the privilege against self-incrimination with respect to any interrogatory. This Court has repeatedly held that the privilege against self-incrimination is not available to one who fails to invoke it in a timely and proper manner. See, *e.g.*, *Marchetti* v. *United States*, 390 U.S. 39, 61; *Rogers* v. *United States*, 340 U.S. 367, 372–375; *United States* v. *Monia*, 317 U.S. 424, 427.

2. The court of appeals further erred in its view that the individual respondents were compelled to incriminate themselves because they were required either to furnish the evidence or to lose their property (App. 365). Respondents were not parties in the libel action and claimed no personal interest in the property which was the subject of that proceeding. The property belonged to the corporation, which has no privilege against self-incrimination and could not assert such a privilege on behalf of any individual officer or employee. *E.g.*, *Campbell Painting Co.* v. *Reid*,

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party's counsel prepared with a view to the pending litigation. The Court found that the policy against invading the privacy of an attorney's course of preparation was so strong that "a burden rests on the one who would invade that privacy to establish adequate reasons" therefor (329 U.S. at 512). Here the interrogatories did not seek to invade a lawyer-client relationship or any other privilege of the corporation.

392 U.S. 286; *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186; *United States* v. *White*, 322 U.S. 694; *Wilson* v. *United States*, 221 U.S. 361.

Whatever the financial relationship of respondents to the corporation—a relationship which does not appear with specificity from the record (see App. 369–370) [16]—they could not utilize the benefits of the corporate form of doing business and still claim an individual, personal interest in the corporate property for the purpose of invoking the Fifth Amendment privilege against self-incrimination. See *United States* v. *White, supra.* Respondents did not lose their personal privilege not to give personal testimony by undertaking to do business in corporate form. They cannot, however, assert a personal *property* interest in goods owned by the corporation. In characterizing Detroit Vital Foods, Inc., as "merely the corporate device through which Kordel sold his products" (App. 369), the court of appeals in effect allowed Kordel to pierce the corporate veil he himself had created, presumably for his own business advantage. It endowed him with a privilege he did not assert as to questions he personally was not obliged to, and did not in fact, answer. The court below thus improperly extended to Kordel, who took refuge behind the corporate veil, property rights and personal privileges beyond those that

[16] The court below stated, as to respondent Kordel, that, although the extent of his ownership in the corporation was not disclosed by the testimony, he "evidently was a major stockholder" (App. 370).

would have been available to him if he had been doing business as an individual."[17]

II. THERE WAS NO VIOLATION OF DUE PROCESS BY THE USE OF INTERROGATORIES IN THE CIVIL SUIT

As we have noted above, the opinion below, while couched in terms of the privilege against self-incrimination, strongly implies that it was basically unfair for the government to insist on any answers to interrogatories in the civil suit at a time when the possibility of bringing a criminal action was in contemplation. The court reversed respondents' convictions without any detailed consideration of the relationship of the answers to the interrogatories to the evidence in the criminal case. It reversed the convictions even though none of those answers was used in the criminal case and even though there was no showing that the answers to the interrogatories produced any evidence used in the criminal prosecution. Rather,

[17] With respect to respondent Kordel, the court below held in the alternative that, "if it should be conceded that Kordel was under no coercion to answer the interrogatories, we are of the opinion that Feldten's admissions were not admissible against him under the rule of *Bruton* v. *United States*, 391 U.S. 123" (App. 370). This holding is plainly erroneous. *Bruton* held that the admission into evidence in a joint trial of the confession of a co-defendant violated the defendant's *Sixth Amendment right of confrontation*. See, also, *Harrington* v. *California*, No. 750, O.T. 1968, decided June 2, 1969. Here, as previously indicated, the answers to the interrogatories, which in any event did not constitute a confession by Feldten, were not admitted into evidence in the criminal prosecution. Obviously, therefore, the right of confrontation was not implicated or infringed and *Bruton* is totally inapposite.

it held, since the government had insisted on having the interrogatories answered, the government was under an obligation affirmatively to show that none of the answers in any way led to any evidence utilized in the criminal prosecution. Thus, the effective holding is that whenever the government goes ahead with a civil suit against a corporation and uses the normal processes of civil procedure in that suit the individual officers of the corporation acquire immunity from criminal prosecution, unless the government affirmatively shows that no information obtained in the civil proceeding in any way led to evidence for the criminal prosecution. This is an unwarranted rule which would unduly hamper the work of many administrative agencies. We recognize that the existence of parallel civil and criminal proceedings poses delicate problems for the agencies involved. We do not deny the need for care in such situations. Our position is that there is no reason for the broad *per se* approach of the court below, and that there is nothing in the facts of this case to show any abuse by the government or detriment to the individual respondents justifying the reversal of their convictions.

A. THE BRINGING OF A CIVIL SUIT DOES NOT BAR CRIMINAL PROSECUTION OR THE USE OF EVIDENCE OBTAINED IN THE CIVIL SUIT UNLESS THERE IS A SHOWING OF BAD FAITH OR UNNECESSARY INJURY TO THE DEFENSE

Federal agencies in a wide variety of fields, including antitrust, internal revenue, food and drug, and securities regulation, among others, are vested by statute with the responsibility of administering laws providing both civil and criminal remedies against offending

corporations or individuals. Such agencies often find it imperative to act quickly by initiating civil or administrative proceedings against goods or persons in order to protect the public from harm while reserving for more studied consideration the question whether to recommend criminal prosecution of the corporation or of various individuals.

The food and drug laws here involved are a prime illustration of the need for prompt civil action. Where, as here, the Food and Drug Administration believes that misbranded drugs are being distributed, there is an obvious need to bring civil condemnation proceedings to protect the public by removing the misbranded drugs from circulation. There is also a need in such civil proceedings to proceed to judgment. Many foods and drugs are perishable or subject to deterioration with age, so that prompt adjudication is required if the value of the seized articles is to be at least partially preserved. For this and other reasons, Congress has specifically provided in 21 U.S.C. 334:

> * * * That no libel for condemnation shall be instituted under this chapter, for any alleged misbranding if there is pending in any court a libel for condemnation proceeding under this chapter based upon the same alleged misbranding, and not more than one such proceeding shall be instituted if no such proceeding is so pending, except that such limitations shall not apply (1) when such misbranding has been the basis of a prior judgment in favor of the United States, in a criminal, injunction, or libel for condemnation proceeding under this chapter, or (2) when the Secretary has probable

> cause to believe from facts found, without hearing, by him or any officer or employee of the Department that the misbranded article is dangerous to health, or that the labeling of the misbranded article is fraudulent, or would be in a material respect misleading to the injury or damage of the purchaser or consumer. * * *

Under this statute, it was necessary to obtain a favorable "judgment" in the forfeiture proceeding to enable the Food and Drug Administration to proceed by multiple seizures against additional quantities of the drugs Korleen and Frutex being marketed by the corporation.[18] While the alternative statutory procedure of a determination by the Secretary to permit multiple seizures of the drugs might have been used, see *Ewing* v. *Mytinger & Casselberry,* 339 U.S. 504, that method is in practice usually reserved for more critical situations in which the misbranding might result in uses which would have a directly harmful effect on the user. The procedure of a determination by the Secretary is more cumbersome for the agency and would be less likely to act as a deterrent to continued marketing of the drugs than a favorable "judgment" of condemnation entered by a court. It was thus both legitimate and necessary for the Food and Drug Administration in this case to seek to expedite the civil action by discovery procedures such as the service of the interrogatories which would prepare the groundwork for a motion for summary judgment.

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[18] The libel in this case concerned only thirty-nine cases of Korleen tablets and 62 cases of Frutex wafers (see App. 291). As indicated *supra*, p. 3, the products of Detroit Vital Foods, Inc., were sold in health food stores across the country (see, also, App. 362).

Another example of the need for prompt civil proceedings is in the field of securities regulation.[19] If a fraudulent stock is being sold, the Securities and Exchange Commission would obviously regard, as its first obligation, the taking of steps to keep the stock from being sold to the general public. It may or may not know at that time whether the course of conduct underlying the activity seemed sufficiently deliberate to warrant criminal prosecution; it may or may not know which individuals were primarily responsible for the fraud. Whether it does or not, it cannot refrain from taking the necessary action to keep the stock off the market, whether by administrative proceedings or a suit for an injunction. Even if the conduct of a particular person is believed to have been so grossly fraudulent that it is fairly certain that criminal proceedings will eventually be brought, the agency would not be justified in leaving the public unprotected by refraining for that reason from bringing a civil action; nor should it refrain from using against him the normal procedures available against any other civil defendant of less culpability. If, on the other hand, a person was believed not to have been guilty of criminal conduct, but evidence developed in good faith in a civil proceeding reveals him to be criminally culpable, he should not obtain, in effect, immunity from criminal liabilty for his conduct.

[19] A letter dated July 17, 1969, to the Solicitor General from the General Counsel of the Securities and Exchange Commission, expressing the Commission's concern about the present case and indicating in some detail how its work could be affected by the decision herein, has, with the Commission's consent, been reproduced as an Appendix to this brief (*infra*, pp. 43–48).

This Court long ago recognized that remedial civil action need not await the outcome of criminal prosecution based on the same acts. In *Standard Sanitary Mfg. Co.* v. *United States*, 226 U.S. 20, 51–52, a suit under the Sherman Act to dissolve a combination, one of the corporate defendants contended that error had been committed in the denial of its motion for an extension of time to take testimony. The specific claim was that the pendency of a criminal action brought by the United States involving the same matters had caused certain officers of the corporation, whom it desired to call as witnesses, to refuse to testify. In rejecting the contention, this Court observed (226 U.S. at 52):

> The Sherman Act provides for a criminal proceeding to punish violations and suits in equity to restrain such violations, and the suits may be brought simultaneously or successively. The order of their bringing must depend upon the government; the dependence of their trials cannot be fixed by a hard and fast rule or made imperatively to turn upon the character of the suit. Circumstances may determine and are for the consideration of the court. An imperative rule that the civil suit must await the trial of the criminal action might result in injustice or take from the statute a great deal of its power. Besides a suit by the Government there may be an action for damages by a "'person injured by reason of anything forbidden by the Act." Must it also wait? Indeed, the reasons urged for the rule, if logically extended, would compel the postponement of the enforcement of the civil remedies until the exhaustion of criminal pros-

> ecutions or their expiration by lapse of time. Until either event occurs the danger of incrimination cannot be said to have passed. It is manifest, therefore, that the most favorable view which can be taken of the rights of defendants in such situation is that they depend upon the discretion of the court in the particular case. We find no abuse of such discretion in the case at bar.

See, also, *Abel* v. *United States*, 362 U.S. 217, 228–230.

There is no practical way in which administrative agencies can wholly insulate civil and criminal proceedings. The investigation initially tends to be unitary and undifferentiated and will normally, as here, have been undertaken by the same government agents. In many instances, it may be necessary for the agency to hold an administrative hearing to determine whether any action is justified, civil or criminal. It cannot be known in advance what may be developed at that hearing. A rule that evidence or information obtained in the civil or administrative proceeding cannot be utilized in the criminal case would require duplication of effort by government agency personnel on a massive scale and would serve no purpose. Nor is there any basis for a distinction between evidence obtained in the civil trial itself and evidence obtained in the investigation leading thereto. In the course of civil proceedings it is quite common for the government to use interrogatories or other forms of discovery designed to simplify the issues and thereby expedite the civil action. So long as this use of civil

discovery techniques is done in good faith to serve the objectives of the civil suit, there is no reason why the government should not normally be able to use any information thus secured to decide whether criminal prosecution is warranted, and to prove its case, just as it could use any other reliable information that might come to it from any source. If, for example, litigation between two private parties revealed evidence of criminality, the government could utilize evidence so disclosed. See *Standard Sanitary Mfg. Co.* v. *United States, supra,* 226 U.S. at 51–52; *United States* v. *American Radiator & Standard Sanitary Corp.,* 388 F. 2d 201, 204 (C.A. 3); cf. *United States* v. *Simon,* 373 F. 2d 649 (C.A. 2), certiorari granted *sub nom. Simon* v. *Wharton,* 386 U.S. 1030, vacated as moot, 389 U.S. 425; *D'Ippolito* v. *American Oil Co.,* 272 F. Supp. 310 (S.D.N.Y.). The fact that the government in good faith has brought the civil litigation for the purpose of protecting the public interest should not require a different result.

This is not to say that the existence of parallel criminal and civil remedies imposes no obligations on the government to proceed with care so as not to violated the rights of a prospective criminal defendant. The government cannot, of course, use one kind of proceeding solely for the purpose of obtaining evidence for use in another type of proceeding. This Court and others have indicated that such bad faith use of criminal or civil procedures is impermissible. See *United States* v. *Procter and Gamble Co.,* 356 U.S. 677, 683–684; *United States* v. *Pennsalt Chemicals Corp.,* 260 F. Supp. 171 (E.D. Pa.); cf. *Beard* v.

N.Y. Central R. Co., 20 F.R.D. 607 (N.D. Ohio); see, also, *Abel* v. *United States*, 362 U.S. 217, 225–230. Even without a showing of bad faith, the courts have found unfairness where a government agency, after initiating an administrative or civil action against the defendant, did not inform him of the fact that criminal prosecution against him for the same conduct was seriously contemplated or had been recommended. Such failure to apprise the defendant of the contemplated criminal proceeding has been held to preclude the government's use therein of any evidence obtained in the civil proceeding. See *United States* v. *Parrott*, 248 F. Supp. 196 (D.D.C.), and cases cited therein; cf. *Gouled* v. *United States*, 255 U.S. 298. But when there has been no deception or unjustified failure to apprise a defendant that criminal prosecution might ensue (as where there had been no preliminary consideration of criminal prosecution), the government is permitted to use evidence disclosed by the civil investigation in the criminal case. See *United States* v. *Parrott*, No. 66 Cr. 243 (S.D.N.Y.), decided February 14, 1969; see, also, *United States* v. *Sclafani*, 265 F. 2d 408, 414–415 (C.A. 2), certiorari denied, 360 U.S. 918; *United States* v. *Light*, 394 F. 2d 908, 913–914 (C.A. 2); *United States* v. *Squeri*, 398 F. 2d 785 (C.A. 2).

Even where a civil action is instituted and pursued by the government in entire good faith, a postponement of the civil action may be justified if a criminal prosecution is also pending and the defendant might be prejudiced therein by disclosure in the civil proceedings of the nature or evidence of his defense. Such

a postponement would be particularly warranted in situations where the public interest can be protected by means of interim relief in the civil action without proceeding to final judgment. For example, if the defendant in a securities fraud case consented to a preliminary injunction withdrawing the stock from the market, it normally would not seem to be necessary, if a criminal prosecution was also recommended, to proceed further in the civil case until after the criminal prosecution has been terminated. The Internal Revenue Service, to cite another example, follows a general policy of not instituting civil proceedings to recover monies where a criminal prosecution involving the same facts is pending or seriously contemplated. See *United States* v. *Jaskiewicz,* 278 F. Supp. 525, 536–537 (E.D. Pa.). In collecting tax deficiencies, there is seldom the need for immediate action to protect the public to be found in the case of stock frauds or food and drug violations.

Similarly, in *Silver* v. *McCamey,* 221 F. 2d 873 (C.A.D.C.), the plaintiff, a taxicab operator, had been arrested for rape. While this charge was pending, the taxicab operators' licensing authority directed him to answer charges that he was not fit to operate a taxicab, in part because of the alleged rape. After a hearing, the authority revoked the plaintiff's license. The court of appeals, in a suit brought by the plaintiff to restore his license, determined that to hold the hearing during the pendency of the rape case violated the plaintiff's procedural rights, since he would be required in the administrative hearing to disclose his anticipated defense in the criminal case. The court found that there

was no need for the agency to hold the hearing on the merits while the rape charge was pending, since the licensing authority could temporarily suspend the plaintiff's license, and thus fully protect the public, pending the outcome of the criminal charge. Manifestly, the situation would have been different if the agency had lacked authority to suspend the license, and had to press the proceeding to completion in order to prevent the defendant from continuing to drive a taxi. Where pursuit of the civil action is necessary to protect the public interest, its postponement has rightfully been refused. Thus, in *United States* v. *Simon*, 373 F. 2d 649 (C.A. 2), certiorari granted *sub nom. Simon* v. *Wharton*, 386 U.S. 1030, vacated as moot, 389 U.S. 425, the court of appeals rejected an argument that accountants whose depositions were sought by a Chapter X trustee in bankruptcy in a suit against their firm, should not be required to testify until resolution of a criminal indictment pending against them involving the same facts. The court reasoned (373 F. 2d at 652):

> * * * We assume without deciding that the lower court had power to issue * * * an injunction, but we hold that it should not have done so, as there is no showing that the depositions sought by the trustee would interfere with the trial of the indictment or the appellees' preparation of their defense.
>
> This appeal requires us to balance appellees' desire to prevent pretrial disclosure of their factual contentions to the prosecution in the Southern District criminal proceeding, without asserting their Fifth Amendment privileges

against self-incrimination, against the interest of the trustee, representing numerous creditors and public security holders of Continental, in the expeditious progress of the Eastern District action. The trustee requires the appellees' deposition testimony to complete his preparation for the trial of the Eastern District action, which must be resolved before the bankruptcy reorganization of Continental, already three and one-half years old, can be completed. It is conceded that the trustee seeks in good faith to depose appellees for purposes of the Eastern District action, and that there has been no consultation on lines of questioning between the trustee and the United States Attorney for the Southern District.

Under these circumstances, the public interest in the progress of the Eastern District action clearly outweighs the appellees' interest in withholding their testimony until after the Southern District trial without invoking their privileges against self-incrimination. It could hardly be contended, and appellees do not contend, that the prosecution in the Southern District could be enjoined from using the deposition testimony given by the appellee Simon before the Southern District indictment was returned. As long as appellees' preparation for the Southern District criminal trial is not hampered, we see no valid distinction in the fact that appellees' remaining depositions could not be scheduled until after the indictment was returned. In both cases, if appellees choose not to assert their privileges against self-incrimination, we see no reason why their testimony should be withheld from the trustee. The fact

> that additional testimony thereby becomes available to the government is merely the natural byproduct of another judicial proceeding; and to that extent it might be "discovery," but it is not discovery which the government has initiated or promoted for the purpose of circumventing the Federal Rules of Criminal Procedure or any constitutional right of the appellees. * * *

A distillation of the various cases in this field seems to us to suggest the following rules. The government is entitled to institute and proceed with a civil case and to use the normal processes of discovery in connection therewith even though there is a possibility of criminal prosecution, unless the civil proceedings are used in bad faith to obtain evidence for a criminal prosecution. Where a criminal prosecution is actually pending against a defendant while the civil case is also pending, and the civil trial or the use of civil discovery proceedings might result in disclosure of the theory and evidence of the criminal defense, a court should weigh the public interest in completion of the civil action against the potential injury to the defendant. If there is no substantial public interest in pressing the civil action promptly to judgment and there is a real, not purely theoretical, possibility that the civil process will be injurious to the criminal defense, the civil action should be postponed. The civil action should not, however, be postponed where there is an important public interest in letting it go forward. A defendant under indictment may protect himself by claiming the privilege against self-incrimination in the civil action. Where criminal prosecution has not

actually been instituted while civil proceedings are pending but is in serious contemplation, it may be necessary to warn the civil defendant of the possibility of criminal prosecution so that he may make an informed judgment as to whether to claim his privilege or seek other relief. In short, the government may proceed by parallel civil and criminal remedies, but it must do so fairly.

B. THERE WAS NO UNFAIRNESS IN THE USE OF INTERROGATORIES IN THIS CASE

By every standard discussed above, there was no unfairness on the part of the government in proceeding with the libel action in order to prevent mislabelled drugs from being peddled to the public. As the district court found (App. 286–288) and the court below did not dispute (App. 367),[20] the government's interrogatories in the civil action to condemn the drugs were served in good faith, as part of the government's legitimate effort to expedite the civil suit. There was a need to proceed to judgment in the forfeiture proceeding in order to protect the public against the mislabelled products which were being sold throughout the country. There was no deception or failure by the government to apprise the corporation or respondents of the fact that criminal prosecution of them was being contemplated. As previously indicated (*supra*, pp. 5–6), the Food and Drug Ad-

[20] As previously pointed out, the court of appeals assumed good faith on the part of the Food and Drug Administration in the present case but held that circumstance to be irrelevant in light of its determination that respondents' Fifth Amendment privilege against self-incrimination had been infringed.

ministration sent the corporation, pursuant to 21 U.S.C. 335, a notice of hearing shortly after service by the agency of its initial interrogatories, informing the corporation that criminal prosecution of it and respondents was being considered, in part for the same conduct which was the subject of the condemnation proceeding. The government did not proceed with the interrogatories in order to obtain evidence for the criminal case. It already had recordings of, and notes taken at, Kordel's lectures, as well as copies of the labeling material distributed with the drugs. Indeed, it did not use the answers at all in its criminal case. The government used the interrogatories merely as part of an effort to bring the forfeiture proceeding to an expeditious conclusion—which is one of the normal, legitimate functions of such discovery procedures. The interrogatories were addressed to the corporation and could be answered by an agent of the corporation other than the respondents, who were in no way obligated to give personal testimony. There is thus no reason why respondents' convictions should have been reversed merely because the interrogatories had been addressed to the corporation.

The court of appeals was apparently influenced in this case by its belief that the interrogatories in the civil condemnation action were broader than was necessary for the purposes of the suit (see App. 369). As we have indicated, even the submission of improper and overbroad interrogatories would not have violated respondents' privilege against self-incrimination since they were under no compulsion to

answer.[21] In any event, the interrogatories at issue here did not seek information which was not directly pertinent to the civil case. The allegation in the libel was, in part, that the drugs were misbranded in violation of 21 U.S.C. 352(f) because of failure of the labeling to bear adequate directions for use for the purposes for which the drugs were intended. An oral statement can constitute proof of the intended use of a product. *E.g., Nature Food Centres, Inc.* v. *United States,* 310 F. 2d 67 (C.A. 1), certiorari denied, 371 U.S. 968; *United States* v. *Article of Drug* * * * *B-Complex Cholinos Capsules,* 362 F. 2d 923 (C.A. 3). The theory of the government's libel was that products labeled as foods were being represented, in written matter and in oral lectures, to be efficacious as drugs. While the government could have proved these oral representations at trial by means of tape recordings in its possession, it manifestly would have expedited the civil suit if the government could establish the content of these representations by means of admissions to the interrogatories and thus be in a position to move for summary judgment. See *United States* v. *Article of Drug* * * *, 43 F.R.D. 181, 188 (D. Del.). It was therefore proper to determine whether the corporate claimant agreed that representations had been made by corporate representatives as to the dis-

[21] Moreover, Rules 30(b) and 33, F.R. Civ. P., provide the means by which a party may be excused, in the civil proceeding itself, from answering improper or overbroad interrogatories. One who fails to pursue this remedy and chooses, instead, to answer the interrogatories should not be heard to claim, in a subsequent proceeding, that the interrogatories violated his rights.

ease-curing efficacy of the products. The interrogatories were directed toward these ends and were thus pertinent to the issues in the civil suit.

In these circumstances it was error for the court below to hold that the government affirmatively must show that, even though it did not introduce the answers to the interrogatories in the criminal prosecution, it also did not use anything said in the answers as a lead to evidence which was admitted in the criminal prosecution. It is, indeed, difficult to see how the corporation's answers could have led to evidence of anything. We do not, however, undertake to rest on that fact. Our position is that it was entirely proper for the government to proceed as it did in the civil suit against the corporation and that the government was therefore under no duty to show that the evidence in the criminal prosecution was obtained wholly independently of the civil suit. Accordingly, the reversal of respondents' convictions was unwarranted.

CONCLUSION

It is therefore respectfully submitted that, with respect to each of the respondents, the judgment of the court of appeals should be reversed and the judgment and sentence of the district court should be reinstated.

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AUGUST 1969.

APPENDIX

SECURITIES AND EXCHANGE COMMISSION,
Washington, D.C., July 17, 1969.

Honorable ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C.

DEAR SIR: In *United States v. Lelord Kordel, et al.* — F. 2d — (C.A. 6, 1969), in which the Supreme Court recently granted certiorari, the Court of Appeals for the Sixth Circuit reversed the criminal convictions of the defendants for violations of the federal food and drug laws. The basis of the reversal was the holding that certain evidence used in the criminal case had been obtained from the defendants in a prior civil action involving the same facts, in violation of the defendants' rights against self-incrimination under the Fifth Amendment to the United States Constitution. Serious problems for this Commission may arise if there should be a decision by the Supreme Court generally setting forth the proposition that the government may not use incriminatory evidence in a criminal action that had been obtained from a defendant in a civil case brought by a government agency involving the same facts.

This Commission typically pursues one or more of the following three types of enforcement actions when investigations conducted by its staff indicate that serious violations of the federal securities laws are occurring or have occurred: (1) civil injunctive actions

litigated in federal district courts;[1] (2) administrative proceedings litigated before Commission hearing examiners and ultimately the Commission itself;[2] and (3) referral to the Department of Justice for criminal prosecution in federal district courts.[3] Additionally, the Commission's staff often participates in corporate reorganization proceedings pursuant to Chapter X of the Bankruptcy Act,[4] including investigations conducted by Chapter X trustees seeking to learn whether there may have been violations of laws giving rise to causes of action on behalf of the estate.[5] Nothing in the federal securities statutes indicates that Congress intended that these activities be mutually exclusive.

The investigation and preparation of a major criminal case under the securities laws may take several years from the time the offense is discovered. There is not in federal securities law cases the kind of *"corpus delicti"* present in the investigation of more traditional crimes. At the commencement of an investigation, our staff can seldom even be sure that a statutory violation has occurred. It is necessary that we gather facts from numerous persons involved in various commercial or business transactions to determine whether or not we are satisfied that violations have occurred and, if so, whether such violations are sufficiently serious to warrant presentation to a grand jury. As an investigation continues, we may gather enough evidence to seek an injunction to stop what appears to be a continuing violation, even though there may not

[1] See, *e.g.*, 15 U.S.C. 77t(b) and 78u(e).

[2] See, *e.g.*, 15 U.S.C. 77h(d) and 78o(b).

[3] See *e.g.*, 15 U.S.C. 77t(b) and 78u(e).

[4] 11 U.S.C. 208.

[5] 11 U.S.C. 567. See *Securities and Exchange Commission* v. *Krentzman*, 397 F. 2d 55 (C.A. 5, 1968).

yet be sufficient evidence of "criminal intent" to recommend criminal prosecution. Such evidence, however, may well be uncovered later in the investigation after civil or administrative proceedings have already been commenced.

In proving facts concerning particular business or commercial transactions in administrative or injunctive proceedings, we do not often have nonparticipant "eye-witnesses" who can testify to much of what occurred. We typically prove our cases by bits and pieces, in part by calling as witnesses participants in the transactions and by analyzing documentary evidence they may produce relating to the transactions in question. In attempts to exculpate themselves participants frequently testify or produce documents pointing to the violations of law that have occurred. If the use of such evidence were precluded in subsequent criminal cases, it would seriously hamper the investigation and prosecution of securities law crimes.

While a criminal case is being developed, it may be necessary to bring an injunction to stop the unlawful activities or to bring an administrative proceeding to determine whether broker-dealers who may be involved should have their registration revoked. By bringing one or both of these proceedings during the development of a criminal case, the Commission is able to prevent violators from continuing to defraud the investing public during the time required to convict them.

For example, 66 indictments and informations, involving 143 defendants, were returned during 1969 in 40 cases that the Commission had referred to the Department of Justice. In 16 of these cases the Commission had brought prior civil court actions, either injunctions or subpoena enforcement proceedings (and in one additional case the Commission had rendered

some assistance to the Food and Drug Administration in bringing an injunction action). In four other cases the Commission had brought prior administrative proceedings, either involving a broker-dealer or a registration statement of securities, and in three additional cases the Commission had participated in proceedings under Chapter X of the Bankruptcy Act involving certain of the persons indicted. Thus, in 24 of the 40 cases in which indictments were returned during the past fiscal year as a result of the Commission's investigations, the Commission had participated in some form of prior civil or administrative action.

It seems to us that a possible effect of the holding in the *Kordel* case will be to make it extremely difficult, if not impossible as a practical matter, for this Commission to pursue parallel or successive proceedings against violators.

We have in recent years been encountering some difficulties in our criminal prosecutions, based upon claims somewhat analogous to the claims raised by the defendants in the *Kordel* case. Thus, during our recent investigation of the financial collapse of the Texas-based conglomerate, Westec Corporation, our staff was asked to participate in the Section 21(e) hearings being conducted by the Chapter X trustee. We did so participate; thereafter, we criminally prosecuted certain Westec officers for violating the federal securities laws. In a presently outstanding appeal from criminal convictions in that case, one of the former Westec officers is alleging that the Commission utilized "parallel" civil bankruptcy hearings to gather evidence to be used in the subsequent criminal prosecution and thereby allegedly violated the constitutional rights of the defendant. See, *United States* v. *James W. Williams* (C.A. 5, Nos. 26829 and 26830).

Similarly, in an investigation of trading in the stock of Rand Development Corporation, the Commission suspended trading in the Rand stock,[6] and thereafter assisted the Food and Drug Administration in the conduct of a civil injunctive action against Rand Development and one of its principals, James Rand, III. In the civil case, Rand was called by the government to the witness stand and testified regarding certain of his transactions regarding the pledge and sale of Rand Stock. Thereafter, we obtained an indictment against Rand for violating the federal securities laws and the federal mail fraud statute. *United States* v. *Rand Development Corporation and James Rand, III* (CR No. 68–433, N.D. Ohio, 1969). Rand has filed a motion to dismiss the indictment, relying on the *Kordel* case, claiming that the S.E.C. used the testimony which he gave in the civil F.D.A. case in order to obtain the subsequent criminal indictment against him. This motion is presently *sub judice.*

To date we have been generally successful in defeating claims in Commission-developed criminal cases where defendants or prospective defendants have alleged that the Commission's staff has utilized prior or parallel civil or administrative proceedings in order to obtain evidence for a subsequent criminal prosecution;[7] however, we have had at least one indictment dismissed, based in part upon such claims.[8]

[6] Securities Exchange Act Release Nos. 8026 and 8081.

[7] See, *e.g.*, *Thal* v. *Pitman* (*Commonwealth Financial Corporation*), *et al.*, 288 F. Supp. 786 (E.D. Pa., 1968), *aff'd*, 408 F. 2d 640 (C.A. 3, 1969), *certiorari denied*, — U.S. — (1969), where the court held it was proper for the Commission's staff to participate in civil bankruptcy hearings at the same time a criminal investigation of the defendant was being conducted.

[8] *United States* v. *Parrott*, 248 F. Supp. 196 (D.D.C., 1965); but see, *United States* v. *Parrott*, — F. Supp. — (S.D.N.Y., 1969), CCH Fed. Sec. L. Rep. ¶ 92,359.

It is readily apparent that, if the Supreme Court affirms the *Kordel* case, the defense of improper "parallel proceedings" will be raised in substantially all of our Commission criminal prosecutions that have been preceded by administrative or civil litigation. While the *Kordel* case may be distinguishable from our cases, should it be affirmed on broad grounds the holding could cause substantial hardship in attempting to protect the investing public and have violators criminally punished.

Sincerely,

PHILIP A. LOOMIS, Jr.,
General Counsel.

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IN THE

Supreme Court of the United States

October Term, 1969

No. 87

UNITED STATES OF AMERICA,

Petitioner,

against

LELORD KORDEL and ALFRED FELDTEN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS [redacted]

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INDEX

	PAGE
Counter-Statement of Question Presented	1
Counter-Statement of Facts	2
A. Introduction	2
B. Facts	3
The Opinions Below	11
A. The Court of Appeals Decision	11
B. The Decision of the District Court	13
Summary of Argument	14
Argument	18
A. The Court of Appeals Did Not Limit the Use of Interrogatories in a Civil Case, or Confer Immunity Upon Respondents	19
B. Respondents Were Under Compulsion to Provide Incriminating Information Even Though the Interrogatories Were Nominally Directed to Their Corporation	20
C. The Procedures Used by the Government Were Inherently Unfair and Violative of Respondents' Rights of Due Process	31
D. The Cases Cited by the Government are Inapposite	38
Conclusion	40
Appendix A to Brief of Respondent	1a

Cases Cited

	PAGE
Albertson v. Subversive Activities Control Board, 382 U. S. 70 (1965)	21
Abel v. United States, 362 U. S. 217 (1960) (dissenting opinion)	35
Blue v. United States, 384 U. S. 251 (1966)	37
Boyd v. United States, 116 U. S. 616 (1886)	13, 21, 32
Brown v. Walker, 161 U. S. 591 (1896)	22
Communist Party v. United States, 331 F. 2d 807 (CADC, 1963)	30
Communist Party of the United States v. United States, 384 F. 2d 957 (CADC, 1967)	22
Counselman v. Hitchcock, 142 U. S. 547 (1892)	21, 22
Curcio v. United States, 354 U. S. 118 (1952)	20, 21
Paul Harrigan and Sons v. Enterprise Animal Oil Co., Inc., 18 FR Serv. 33.325 Case 1 (EDPA, 1953)	32
Haynes v. United States, 390 U. S. 885 (1968)	29
Leary v. United States, ... U. S. ..., 23 L. ed. (2) 57 (1969)	29, 31
Lelles v. United States, 241 F. 2d 21 (9th Cir. 1957)	27
Marchetti v. United States, 390 U. S. 39 (1968)	29
McCarthy v. Arndstein, 266 U. S. 34 (1924)	22
McNabb v. United States, 318 U. S. 332 (1942)	17, 31
Morissette v. United States, 342 U. S. 246 (1952)	25
Penn v. Automobile Insurance Co., 27 F. Supp. 336 (Ore. 1930)	32

PAGE

Rea v. United States, 350 U. S. 214 (1955) 17, 31

Shapiro v. United States, 335 U. S. 1 21

Silver v. McCamey, 221 F. 2d 873 (CADC, 1955) 39

United States v. A. B. Dick Co., 7 FRD 442 32

United States v. Blue, 384 U. S. 251 (1966) 19, 32

United States v. Bridges, 86 F. Supp. 931 (N. D. Cal., 1949) 32

United States v. Dotterweich, 320 U. S. 277, 64 S. Ct. 134, 88 L. Ed. 48 (1943) 25, 26, 27, 29

United States v. Jaskiewicz, 278 F. Supp. 525 (E. D. P. A., 1968) 39

United States v. Kaadt, 171 F. 2d 600 (7th Cir. 1949) 27

United States v. Light, 394 F. 2d 908 (C. A. 2, 1968) 39

United States v. Linen Supply Institute of Greater New York, 18 FRD 452 (SDNY) 32

United States v. Lipschitz, 132 F. Supp. 514 (ED NY, 1955) 32

United States v. Parfait Powder Puff Co., 163 F. 2d 1008 (7th Cir. 1947) 27

United States v. Parrott, 248 F. Supp. 196 (DC, 1965) 31, 37

United States v. Parrott, No. 66 Cr. 243 (S. D. N. Y., Feb. 14, 1969) 39

United States v. The Saline Bank, 26 U. S. (1 Pet.) 100 (1858) 21, 32

United States v. Scalfani, 265 F. 2d 408 (C. A. 2, 1959) 39

United States v. Simon, 373 F. 2d 649 (C. A. 2) 38

PAGE

United States v. Squeri, 398 F. 2d 785 (C. A. 2, 1968) 39

United States v. Thayer, 214 F. Supp. 929 (D. Colo., 1963) 31, 37

United States v. White, 322 U. S. 694 (1943) 29

United States v. 42 jars . . . BEE Royale Capsules, 264 F. 2d 666 (C. A. 3) 24

United States v. 3963 bottles . . . Engergol, 265 F. 2d 332 (C. A. 7) 24

Wilson v. United States, 221 U. S. 361 (1911) 20

Statute Cited

Federal Food, Drug and Cosmetic Act:

21 U. S. C. 331 (a) 2, 3

21 U. S. C. 331 (k) 2, 3

21 U. S. C. 332 34

21 U. S. C. 334 ..... 3, 33

21 U. S. C. 335 5

21 U. S. C. 373 ..... 22fn

Other Authorities Cited

F. R. Civ. P.:

Rule 33 ..... 5, 14

Rule 41(e) 31

Vicarious Criminal Responsibilty, 19 Ind. L. Rev., 265 25

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

Counter-Statement of Question Presented

Whether evidence, leads and admissions obtained in interrogatories directed to a corporation in a civil *in rem* case, and answered over objection, by an officer of the corporation, should have been suppressed in a parallel criminal case against the corporate officers based upon the same facts, where the civil *in rem* case and investigation of the criminal case went forward on a common front, and the interrogatories were designed and used to obtain information concerning the activities of the officers?

Counter-Statement of Facts

A. Introduction

The respondents, Lelord Kordel and Alfred Feldten, are president and treasurer respectively of Detroit Vital Foods, Inc., a Michigan corporation. Respondents and the corporation were indicted on July 17th, 1963 for violations of the Federal Food, Drug and Cosmetic Act, 21 U. S. C. 331 (a) and (k), i.e., introduction into interstate commerce of misbranded drugs and causing a drug to be misbranded after it had been shipped in interstate commerce. Respondents and the corporation were found guilty by a jury on five counts of the indictment, and judgments of conviction were entered in the United States District Court for the Eastern District of Michigan, Southern Division. Respondents received jail sentences and substantial fines were imposed upon them and their corporation.

On July 26th, 1968, the United States Court of Appeals for the Sixth Circuit reversed the judgments of conviction as to respondents and their corporation. The Court of Appeals held that the evidence and leads obtained over objection, by compulsory interrogatories in a civil *in rem* action seeking forfeiture of the property of respondents' corporation, should have been suppressed in a later criminal prosecution of respondents and the corporation based upon the same basic facts, because the Government had brought parallel civil and criminal proceedings, had utilized discovery to obtain admissions to prepare the criminal case, and the evidence and leads obtained by the interrogatories were used against respondents in the criminal case (App. 369). In essence, the Court of Appeals held that a civil case and a criminal case, with the same facts, may not go forward on a common front and be commingled

under circumstances wherein a prospective defendant in a criminal case is coerced into providing incriminating evidence for use in the criminal case, under penalty of either giving the evidence or suffering a forfeiture of his corporation's property.

On September 27, 1968, the Government petitioned the Court of Appeals for a rehearing, and on February 20, 1969, the Court of Appeals modified its prior opinion by affirming the judgment of conviction as to the corporation, and adhering to its prior decision reversing the judgments of conviction as to the respondents. This opinion of the Court of Appeals is reported at 407 F. 2d 570 and superseded the Court's prior opinion in all respects.

On April 21, 1969 a petition for a Writ of Certiorari was filed by the Government to review the Court of Appeals' reversal of respondents' convictions, and was granted by this Court on June 2nd, 1969. On April 21, 1969 a petition for a Writ of Certiorari was filed by counsel herein to review the Court of Appeals' affirmance of the corporation's conviction. The petition was denied by this Court's order dated June 2nd, 1969 (O. T., 1968, No. 1285). A petition for rehearing of the order was duly filed, but no ruling has been made by this Honorable Court as of the date of the writing of this brief.

B. Facts

On June 9, 1960, prior to the present indictment, a civil *in rem* action was brought by the Government under the Federal Food, Drug and Cosmetic Act, 21 U. S. C. 334, seeking condemnation of various drugs on the ground that they were misbranded and violative of 21 U. S. C. 331 (a) and (k). Detroit Vital Foods, Inc., respondents'

corporation filed an answer denyng the material allegations of the libel.

On January 9, 1969, the Government served written interrogatories in the civil case, consisting of approximately 1,300 questions seeking comprehensive and detailed information and admissions concerning the activities of the corporation and the respondents. The interrogatories sought information and admissions as to virtually every aspect and element which formed the subject of the present criminal case, including interstate commerce, labeling status, relationship of respondents to their corporation, lectures by respondent Kordel, and every conceivable fact related or even remotely related to the determination of whether respondents had misbranded the articles while held for sale, or had introduced misbranded articles into interstate commerce in violation of the Act (App. 304-320). Included in the unbelieveably searching interrogatories, were questions concerning the nature of any "business" relationship between respondent Kordel and Vital Foods Stores (Interrogatory 64); other names used by respondent Kordel; his relationship to other companies owned by him (Interrogatory 1); and statements made by Kordel at various lectures (Interrogatories 17-23, 54, 55). In short, the interrogatories were not merely directed to the corporate activities, but to virtually every aspect of respondent Kordel's business and individual activities. Further, most of the interrogatories were framed as requests for admissions, accompanied by alternative interrogatories requesting a full and complete statement of the true facts, and the name and address of each person who had personal knowledge of the truth of each of such facts, in the event the admission was not unqualifiedly made. (See for example, Interrogatories 1-4, App. 304).

Almost simultaneously with the service of the Government's interrogatories, and on or about January 19, 1961,

the Food & Drug Administration served the first of a series of notices upon respondents and their corporation,* pursuant to §305 of the Act, (21 U. S. C. 335) informing them that criminal action was contemplated against them for the same violations of the Act which were the subject of the civil *in rem* case. The said notice advised respondents that they were responsible for criminal violation of the Federal Food, Drug and Cosmetic Act and that they could present their views with respect to the charges before a decision was reached as to whether the matter should be referred to the Department of Justice for prosecution.

On April 7th, 1961 a motion was filed in the civil case for an order staying further proceedings therein, or in the alternative, for an order extending the time to answer the Government's interrogatories until after the disposition of the threatened criminal proceedings (App. 329). Specifically, it was urged that the Government had served notice of its intention to criminally prosecute respondents and their corporation; that the issues involved in the contemplated criminal case were identical to, and would be dispositive of, the issues involved in the civil case; that granting of the motion would be in the interest of substantial justice; and that the District Court should exercise its discretion under Rule 33 F. R. Civ. P. to enter an order enlarging the time to respond to the interrogatories as good cause had been shown (App. 332).

While specific reference to the Fifth Amendment was not made, the motion articulated respondents' real concern that response to the interrogatories would provide the Government with the opportunity to obtain information

* On April 19, 1961 two additional notices were sent, one directed to respondent Feldten and the other directed to respondent Kordel and "Vital Foods, Inc." On September 25th, 1961, after the interrogatories had been partially answered, a fourth notice was sent to respondents and their corporation. The four notices are reprinted in the appendix A hereto.

via civil discovery procedures which would not be available to it in the contemplated criminal case; and that the elements of proof in the criminal case were identical with the elements of proof in the civil case. In this connection, it was specifically noted that to require a disclosure of the information requested in the Government's interrogatories would provide information to assist the Government in sustaining its allegation of criminal violation of the Act, and would reveal the prospective defendants' evidence and defense (App. 331-336).

On April 10th, 1961, shortly after the motion was filed but prior to the District Court's disposition thereof, the Government filed a second series of "Additional Written Interrogatories" (App. 321-328), requesting further information concerning statements made by respondent Kordel in his lectures (additional interr. 19, 28); additional admissions coupled with alternative requests for detailed information as to the true facts in the event unqualified admissions were not made; further information concerning interstate shipments of various products, and labeling and formulae for same; and additional admissions that certain excerpts from Kordel's lectures were true and accurate (App. 327). These additional interrogatories comprised hundreds of separate and distinct questions concerning every conceivable detail of the activities of Kordel and his corporation which might have been omitted from the original interrogatories. Both sets of interrogatories aggregate more than 2,000 questions.

The Government opposed the motion before the District Judge, on the ground that the criminal proceedings had not yet been, and might never be instituted, and that the interrogatories therefore, should be answered. The District Judge, while recognizing the indentity of the facts involved in the civil and criminal cases, nevertheless denied the motion and ordered that the interrogatories should be

answered. The Court apparently concluded that there would be no prejudice or harm, because there was no certainty that criminal proceedings would, in fact, ever be instituted * (App. 337-339).

On July 20, 1961, objections to certain of the interrogatories were filed on the grounds, *inter alia*, that they called for admissions of violations of the Federal Food, Drug and Cosmetic Act, and were therefore improper. On September 5, 1961, answers to numerous interrogatories were submitted by the corporation and subscribed to by respondent Feldten as vice president ** (App. 345-348).

On September 13, 1962, the District Court entered an order sustaining the objections to certain of the interrogatories and requiring answers to others. Accordingly, on September 24th, 1962, supplemental answers to the Government's Additional Written Interrogatories were subscribed to by respondent Feldten as before (App. 349-352).

The answers and supplemental answers to the Government's interrogatories and additional interrogatories, contained admissions concerning interstate commerce; Kordel's status as president of the corporation; the use of various trade names; the placing of newspaper advertisements concerning Kordel's lectures; labeling for the products; statements made by Kordel, etc. (App. 345-352).

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* Any failure thereafter to commence criminal proceedings could not result from a lack of evidence, as everything needed to prosecute respondents was ordered to be provided under penalty of suffering a forfeiture of respondents' corporate property.

** On August 4, 1961 the General Counsel of the Food & Drug Administration prepared a motion to decree a default for failure to answer the interrogatories within the time specified. Knowledge of the preparation of such a motion was communicated to Mr. Josh Randolph, a Food & Drug officer in the Division of Case Supervision of the Food & Drug Administration between August 4 and August 10, 1961 (App. 236-237).

On August 31, 1961, with full knowledge of the District Judge's order to supply answers to the interrogatories (App. 237), Josh Randolph of the Food & Drug Administration made an initial recommendation to indict the respondents and their corporation. *At the specific request of Randolph, the answers to the interrogatories filed on September 5, 1961, were forwarded to him on September 22, 1961, and on October 18, 1961 Randolph wrote a memorandum reaffirming his August 31st recommendation that respondents be indicted* (App. 237).

On July 28, 1969, approximately one month after the District Judge had ordered answers to the interrogatories, another officer of the Food & Drug Administration, in recommending criminal prosecution against respondents, *made specific reference to the necessity to answer the interrogatories as ordered by the District Judge* (App. 143). Further, in that same written communication, the Food & Drug Administration officer specifically acknowledged that he anticipated no difficulty in establishing interstate commerce with respect to the product Korleen, because of the answers to the civil interrogatories (App. 141-143).

On September 22, 1961, Randolph instructed a representative of the Detroit office of the Food & Drug Administration to issue another notice of intention to commence a criminal action against respondents, and, as above noted, specifically requested the representative to send him a copy of the answers. The representative complied with Randolph's request and sent him a copy of the answers, together with three copies of the notice of criminal action which he had issued (App. 173-174).

On November 29, 1962, the civil action was terminated by a consent decree, in which it was agreed by the Government that the entry thereof would not constitute an admission that the Act had been violated.

On July 17, 1963, respondents and their corporation were indicted for the same acts of wrongdoing set forth in the civil action, referred to in the interrogatories, and enumerated in the criminal notices of hearing.

Respondents thereafter moved to quash the indictment and to suppress all evidence and leads obtained by the Government through the use of the interrogatories in the civil action, on the ground that the use of such evidence and leads constituted "an unconstitutional exercise of inquisitorial authority" and was abhorrent to, and violative of, fair and civilized standards of procedure in the administration of criminal justice. In the alternative, respondents moved for a hearing to determine the date on which the Government had decided to initiate the criminal prosecution (App. 46, 53).

The Trial Court denied the motion, but ordered a hearing to determine the Government's motive in instituting the civil action (App. 52).

At the hearing, it was developed that the civil case and the investigation of the criminal case had gone forward on a common front; that the investigation of the civil and criminal case were one and the same investigation and part of one file; and that everything obtained in the civil case was included in the criminal file and forwarded through Government channels for use in the criminal case (App. 115-116).

Moreover, it was learned that it was the practice and policy of the Food & Drug Administration, as a matter of routine, to obtain information in a civil case for use in a criminal case (App. 146-147). It was further learned that the initial recommendation for criminal prosecution was not made until after the District Judge had ordered answers to the interrogatories and had denied the motion to stay the civil action or to enlarge the time to answer (App. 162).

The hearing further established, as above noted, that the answers to the interrogatories had been filed on September 5, 1961 (App. 165), and that on September 22, 1961, Food & Drug Administration officer Randolph, who had handled the criminal prosecution, requested a copy of the defendants' answers to the interrogatories, and was sent same on September 25, 1961 (App. 174).

On October 18, 1961, Randolph recommended that respondents be indicted (App. 237). Randolph had direct responsibility for the prosecution of the civil case (App. 176), and had prepared the interrogatories at the very time that he was contemplating the issuance of a recommendation of criminal prosecution (App. 223-224). In fact, Randolph forwarded the answers to the interrogatories and all other papers in the civil case to the office of the Food & Drug Administration General Counsel to assist them in preparing the proposed indictment (App. 239). The indictment was prepared by the General Counsel's office and was identical to the indictment returned by the Grand Jury. The record further shows that additional notices of intention to prosecute respondents were sent at Randolph's recommendation after the answers to the interrogatories had been received (App. 237-239).

The record thus contains overwhelming proof, undenied in the Government's brief, of a complete commingling of the civil and criminal cases, and the use of the interrogatories and answers thereto in investigating the criminal offense and determining whether to prosecute.

As to whether the information obtained by the interrogatories was in fact used, the record is likewise clearly beyond peradventure of doubt that the information assisted in the investigation, presentation and prosecution of the present indictment.

One Government agent testified that because of the District Judge's order requiring answers to the interroga-

tories, the Government would have no difficulty in establishing the element of interstate commerce for one of the products involved in the criminal case (App. 143).

Another Government agent testified that he had used the answers to the interrogatories to prepare his testimony before the Grand Jury; that he had entered the grand jury room armed with the proposed indictment which had been prepared by his Food & Drug Administration associate, who also prepared the interrogatories, received the answers and recommended the indictment (App. 196-198). Further, a Government agent testified that it was the routine practice for the Food & Drug Administration to use discovery in a civil case to obtain evidence for a criminal prosecution (App. 146-147).

The Opinions Below

A. The Court of Appeals Decision

The Court of Appeals reversed respondents' convictions, holding that the Government may not maneuver individuals into a situation whereby it obtains and uses evidence against them in a criminal case "which has been coerced from (them) under penalty of either giving the evidence or suffering a forfeiture of (their) property" (App. 370).

The record amply supports the factual predicates for the holding by the Court of Appeals which made the following findings of fact:

1. The civil case and investigation of the criminal case had gone forward on a common front. Information obtained in the civil case was transmitted to those in charge of the criminal investigation; the civil and criminal cases were part of one file, and indeed, recommendation for criminal prosecution was not made until after the District

Judge had ordered the interrogatories to be answered in the civil case. The interrogatories were prepared by Mr. Randolph of the Food and Drug administration in Washington, D. C., who initially recommended the criminal action against the respondents. The answers to the interrogatories were sent to Randolph, and the indictment was prepared in Randolph's office (App. 365).

2. The interrogatories, while nominally directed to respondents' corporation, were for the most part, requests for admissions by, and information about, the respondents. Many of the interrogatories required answers revealing Kordel's activities, speeches and representations then under scrutiny in the contemplated criminal action (App. 368).

3. The interrogatories submitted by the Government were broader than would ordinarily be needed in a civil case and "were specifically directed toward the activities of Lelord Kordel," president of the corporation and principal defendant in the case (App. 369).

4. The corporation "was merely the corporate device through which respondent Kordel sold his products", and the Government had "wanted to cut through the facade and get at Kordel who was the president and dominant personality in the corporation", apparently a major stockholder, and, as such, "had financial interest in the seized property, and certainly, as president of the corporation, had participated in the decision to answer the interrogatories" (App. 369-370).

5. The evidence and leads obtained by reason of the interrogatories were used against the respondents in the criminal case (App. 369).

The Court of Appeals concluded from the aforementioned facts and applicable precedents, that respondents

had been required to supply incriminating information about themselves through civil discovery, under penalty of suffering a forfeiture of their property, and, consequently, had been compelled to be witnesses against themselves within the meaning of the Fifth Amendment; that, in effect, they had been subjected to the equivalent of an unreasonable search and seizure within the meaning of the Fourth Amendment; and had been the victims of extraordinarily unfair inquisitorial tactics on the Government's part.

B. The Decision of the District Court

The Trial Court, while ultimately denying respondents' motion to suppress after a hearing inquiring into the Government's motives in filing the interrogatories (App. 284-288), made observations of fact and law in its initial opinion wholly consistent with those of the Court of Appeals.

Thus, in its initial opinion, the Trial Court (as did the Court of Appeals) drew attention to *Boyd* v. *United States,* 116, U. S. 616 (1886), noting that while the precise holding in *Boyd* may have been limited to the compulsory production of private books and papers of an individual, rather than of a corporation's goods sought to be forfeited, other language in *Boyd,* "suggests that the holding was placed on a broader basis than the Fourth Amendment and would also apply to bar the use in evidence in a criminal action of compelled discovery of admissions in a civil action concerning the same transaction" (App. 54). The Trial Court further noted that the information obtained by the interrogatories in the civil case was not confined to information obtainable from corporate books and records which were subject to subpoena, but called for *admissions.* "As such," said the Trial Court, "they constituted 'a discovery which might tend to convict the party of a crime and compulsory discovery by extorting the party's oath' " (App. 54).

Summary of Argument

The Government's argument is based upon an erroneous reading of, and over-reaction to, the Court of Appeals' decision. The Court of Appeals, contrary to the Government's suggestion, did not adopt a *per se* rule automatically granting immunity to individual officers of a corporation, where the Government presents a civil suit against a corporation and uses the normal processes of civil discovery (Gov't. Br., pp. 16, 25). The Court of Appeals made it perfectly clear that there was no immunity involved and that the Government could file criminal proceedings against the same persons on the same charges that are involved in a civil case. The Court of Appeals merely held, that where the Government has maneuvered an individual into a situation in a civil case where he is faced with a choice of answering interrogatories and thereby incriminating himself in a contemplated criminal case, or suffering a forfeiture of his corporate property, the evidence and leads obtained by discovery must be suppressed.

No immunity was granted, the indictment was not dismissed, and the Government was merely relegated to proving its criminal case without the benefit of the admissions, evidence or leads obtained from the interrogatories—a task which should present no real difficulty to the Government, if, as the Government claims throughout its brief, it had obtained all of the evidence and answers necessary to prosecute respondents through independent investigation.

1. The Government argues that respondents were under no compulsion to supply incriminating information, because the interrogatories were directed to the corporation, whose duty under F. R. Civ. P. 33, was to appoint an officer or agent to answer the interrogatories who could,

without fear of self-incrimination, furnish such requested information as was available to the corporation.

The argument is one of form rather than substance. It is settled that corporate officers, by assuming the duties of their office are not deprived of their privilege against self-incrimination, and cannot be compelled to give oral or written testimony, or do any act (except produce corporate books and records of which they are custodians) which may incriminate them.

The corporation, as an incorporeal entity could provide information or perform physical acts only through human individuals. Therefore, when the Government argues that it was the corporation's obligation to appoint an agent to provide the information available to the corporation, it is in reality suggesting that respondents should have first appointed an agent in behalf of the corporation and then furnished him with information concerning their personal activities, which respondents would have been privileged to withhold in the first place. This two-step incrimination is forbidden by the Constitution.

Significantly, the interrogatories called for information which could only have been provided by respondents, since the interrogatories, for the most part, were requests for admissions concerning respondents' personal activities. As such, the corporation could not provide the information available to it without requiring respondents to make admissions concerning their individual activities—admissions which they were privileged to withhold.

The Government recognizes that the record does not contain any evidence that other persons were available to answer the interrogatories, but argues that respondents' attorneys should have answered the interrogatories, and that in any event respondents have the burden to show the inability of any other person to answer the interrogatories.

We disagree with both contentions. In the first place, if the privilege of self-incrimination means anything, it must mean that an accused cannot be required to designate his attorney to provide information which the accused himself would have the privilege to withhold under the Fifth Amendment. It would be a strange doctrine when an attorney, to avoid forfeiture of property, must answer interrogatories and thus incriminate his own client.

The burden of proving the availability of another agent to answer the interrogatories should be upon the Government. The Act involved herein imposes broad criminal liability on all persons having responsibility for shipment of misbranded drugs, regardless of incorporeal or proprietary relationships. To require respondents to make a showing as to the non-availability of another agent, or to prove that the corporate agent has provided all of the information available to the corporation, would in all likelihood require respondents to waive their privilege, and testify either as to their efforts to find a volunteer, or as to the information actually available.

2. The Government argues that respondents were under no compulsion to answer, because only corporate property was at stake in the event of a default for failure to answer.

However, as was pointed out by the Court of Appeals, the corporation was merely the device through which respondent Kordel sold his products, and the Government itself had sought to cut through the corporate facade to get at Kordel, the president, dominant personality, and apparent major stockholder of the corporation. Under these circumstances, Kordel's financial interest in the seized property was adequate for purposes of the Fifth Amendment, even if he was not the technical legal owner of the goods.

As will be subsequently shown herein, the Federal Food, Drug and Cosmetic Act is not concerned with proprietary or corporeal relationships, but with the shipment of misbranded drugs. The corporate veil has been effectively pierced to impose criminal liability under that Act. Its breach should not be repaired so as to deny the target of a criminal investigation his privilege against self-incrimination.

3. Apart from the Fifth Amendment, the Government's tactics here transcended fair and reasonable standards of criminal justice. Civil and criminal functions were totally commingled so that respondents were whipsawed into a completely inescapable position. They were either required to provide incriminating information at the very time that a criminal case was being planned against them, or suffer forfeiture of their corporate property.

There is here involved a shocking example of agency indifference to abusive inquisitorial authority and a misuse of the discovery procedures available under the Federal Rules of Civil Procedure. The holding and rationale of the Court of Appeals is fulsomely supported by the record and is entirely consistent with the holdings of this Court, recognizing and invoking exclusionary rules where the evidence has been obtained in violation of an accused's constitutional rights; or where the Court's supervisory authority is necessary to prevent the exercise of the Government's inquisitorial authority in a manner which is abhorrent to fair and civilized standards and procedures in the administration of criminal justice. *McNabb* v. *United States* 318 U. S. 332, 340-343 (1942); *Rea* v. *United States*, 350 U. S. 214 216-217 (1955).

Argument

The Government asserts that even though the interrogatories sought detailed information and admissions as to the respondents' individual activities, respondents nevertheless, were under no compulsion to answer the interrogatories because the interrogatories were nominally addressed to their corporation whose duty it was to appoint an agent—even respondents' attorney—who could, without fear of self-incrimination, furnish such requested information and admissions as was available to the corporation.

The Government further asserts, that regardless of respondents' financial relationship to their closed corporation, there was no compulsion on respondents stemming from the fact that a failure to answer the interrogatories might result in a forfeiture of their property, because technically, the articles under seizure were the property of the corporation and not respondents as stockholders.

We disagree with both contentions and submit that the Government's position is based upon a mechanical, unrealistic and highly impersonal application of the corporate entity theory, without regard to respondents' interests as represented by their Fifth Amendment privilege; the extraordinarily unfair tactics employed by the Government in this case to "get at" respondents through their corporation; or the unique statute under which respondents were indicted. In effect, the Government's contention is that it may cut through the corporate veil in its interrogatories "to get at" respondents, and then may repair the breach to deny respondents their Fifth Amendment privilege and right of due process.

We further submit that the Government has over-reacted to the holding of the Court of Appeals and the factual predicates therefor.

A. The Court of Appeals Did Not Limit the Use of Interrogatories in a Civil Case, or Confer Immunity Upon Respondents.

It should be emphasized at the outset, that the Court of Appeals did not hold that a Government agency may not utilize interrogatories in a civil *in rem* action against a corporation and thereafter commence a criminal prosecution for the same alleged illegal activities. Indeed, the Court of Appeals specifically noted that it was not so holding (App. 370), and further noted that its holding was *limited* to the proposition that the Government may not *use* evidence or leads against a defendant in a criminal case which had been obtained by compulsory interrogatories nominally directed to a defendant's closed corporation, where the defendant is the target of the criminal case, under penalty of either providing the information or suffering a forfeiture of his property in the corporation.

The Court of Appeals thus merely held that under the outrageous facts of the instant case, the Food and Drug Administration had obtained admissions, evidence and leads not otherwise available in a criminal case, to investigate, commence and prosecute a criminal action; and that such evidence, leads and admissions, while available for use in the civil case, should have been suppressed in the criminal case.

Nor did the Court of Appeals hold, as the Government suggests, that the use of interrogatories directed to a corporation in a civil case confers immunity from prosecution for the misdeeds of the individual officers of the corporation. The record is clear that the Court of Appeals did not dismiss the indictment, but merely remanded the case for a new trial. There is no immunity here involved—nor is the Government agency precluded from retrying respondents on the same charges that were involved in the civil case. See *United States* v. *Blue*, 384 U. S. 251 (1966).

B. Respondents Were Under Compulsion to Provide Incriminating Information Even Though the Interrogatories Were Nominally Directed to Their Corporation.

1.

The Government argues that "in no sense" were respondents compelled to incriminate themselves (Govt. Br., p. 16), because the interrogatories were directed to their corporation whose duty it was to select an agent—even respondents' attorney—who could, without fear of self-incrimination, furnish such information and admissions as was available to the corporation. The argument is one of form rather than substance.

It is well settled that a corporation cannot invoke the Fifth Amendment privilege. This, of course, does not mean that officers or agents of a corporation who are potentially subject to criminal responsibility must provide information, or do any act (except the production of corporate books and records of which they are custodians) which may incriminate them. Clearly, each corporate officer or agent could refuse to provide incriminating information claiming his Fifth Amendment privilege. *Curcio* v. *United States,* 354 U. S. 118, 123, 124 (1952); *Wilson* v. *United States,* 221 U. S. 361 (1911).

In the *Wilson* case, *supra,* this Court drew the distinction between the obligation of corporate officers to produce corporate records, and the officers' right to refuse to provide other information stating:

> "They [the custodians of corporate records] may decline to utter upon the witness stand a single self-criminating word. They may demand that any accusation against them individually be established without the aid of their oral testimony or the compulsory production by them of their private papers" (221 U. S. at 385).
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Similarly, in the *Curcio* case, *supra*, this Court again stated:

> "A custodian, by assuming the duties of his office undertakes the obligation to produce the books of which he is custodian, in response to a rightful exercise of the state's visitorial powers. But he cannot lawfully be compelled, in the absence of a grant of adequate immunity from prosecution, to condemn himself by his own oral testimony" (354 U. S. at 123, 124; *Shapiro* v. *United States*, 335 U. S. 1, 27).

And if he cannot be compelled to condemn himself by oral testimony, " . . . we do not see how compulsion in writing makes a difference for constitutional purposes". *Albertson* v. *Subversive Activities Control Board*, 382 U. S. 70, 78 (1965). Indeed, the privilege applies where incriminating information is sought by discovery in civil cases. *United States* v. *The Saline Bank*, 26 U. S. (1 Pet.) 100 (1858) *; *Boyd* v. *United States*, *supra*.

Further, with respect to the Fifth Amendment, a person is

> " . . . *protected 'from being compelled to disclose the circumstances of his offense, the sources from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained* or made effectual for his connection, without using his answers as direct admissions against him." *Counselman* v. *Hitchcock*, 142 U. S. 547, 585 (1892). (emphasis added).

If the disclosure of information by witnesses is of greater importance than the possibility of punishing them for some

* In the *Saline Bank* case, the duty of the bank, its cashier and stockholders to make any discovery in a civil case was suspended, where the facts required to be discovered would expose the parties to a danger of criminal penalties.

crime, Congress can "as in other cases, confer the power of unrestricted examination by providing complete immunity". *McCarthy* v. *Arndstein,* 266 U. S. 34, 42 (1924); *Brown* v. *Walker,* 161 U. S. 591 (1896).*

No statute which leaves a party subject to criminal proceedings if he provides or is compelled to provide incriminating information or leads, can over-ride the privilege conferred by the Fifth Amendment. *Counselman* v. *Hitchcock supra.*

As the gamut of this Court's decisions over the years so clearly demonstrates, this Court has breathed life and vitality into the privilege as it relates to all natural persons, regardless of their relationship to corporate entities; regardless of the form (oral, written or acts) in which the information is sought; or the forum (civil, administrative, investigatory, criminal) in which the privilege question may arise.

To require respondents, as officers of the corporation, to appoint an agent, and then supply that agent with the information necessary to answer the interrogatories, is to require them to incriminate themselves in two steps. As was stated by Judge Prettyman in his concurring opinion in *Communist Party of the United States* v. *United States,* 384 F. 2d 957, 969, (CADC, 1967):

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* Significantly, the Federal Food, Drug and Cosmetic Act contains no general immunity provisions. Section 703 of the Act, however (21 U. S. C. 373), does appear to strike a balance between the need to obtain certain information to enforce the provisions of the Act, and the rights of the individual to prevent information obtained from being used against him in a criminal prosecution. In the instant case, the Government argues the right to accomplish by interrogatories that which the legislative structure of the Act indicates it may not accomplish by compulsory investigation. The information sought and obtained by the civil interrogatories includes, at least in part, the type of information referred to in Section 703 of the Act as to which the person providing same would be entitled to have such information suppressed.

"This is two-step incrimination, but it seems to me that the person is incriminating himself just as effectively as if he himself handed the list to the Government; and he cannot be compelled to do it.

The same reasoning as that outlined in the preceding paragraph applies to the suggestion that the Party might hire an agent and pay him a fee to execute the registration. It might, of course, but our problem is whether it can be compelled to do so. It seems to me close to frivolous to suggest that a person protected by the Fifth Amendment can be compelled to hire an agent, furnish him with the means to instigate a criminal prosecution against him (the giver), and then authorize him (the agent) to do so.

I think the Government cannot compel people to incriminate themselves, either by testifying or by supplying documentary evidence, and either by themselves supplying an incriminatory document or by giving it to a volunteer or a hired agent to give to the Government. In short, I think a person cannot be compelled to incriminate himself, either directly by his own action or by a second-, third- or fourth-hand action through some complicated intermediary process." (Emphasis added.)

As the Court of Appeals observed, the interrogatories were for the most part requests for admissions by and information about Kordel. Many of the interrogatories required answers revealing Kordel's activities, speechs and representations then under scrutiny in the contemplated action (App. 368). As such, the corporation could not provide the information available to it without requiring Kordel to make admissions concerning his individual activities and supply information which only he would know and which he was privileged to withhold.

The Government's argument that the Fifth Amendment privilege is not available to respondents because they made no personal claim to the seized property, is likewise one of form and not substance. The same argument was made to, and rejected by, the Court of Appeals which expressly found (a) that the corporation was merely the corporate device through which Kordel sold his products, and (b) that the Government itself had sought to cut through the corporate facade to get to Kordel who was the president, dominate personality and apparently the major stockholder (App. 369-370). The Court of Appeals thus properly held that Kordel's financial interest in the seized property was as real, for purposes of the Fifth Amendment and due process, as if the seized property was owned by him in his individual capacity.

The Government's reliance upon *United States* v. *3963 bottles . . . Engergol,* 265 F. 2d 332 (C.A. 7) and *United States* v. *42 jars . . . BEE Royale Capsules,* 264 F. 2d 666 (C. A. 3) is misplaced. Neither of these cases deals with nor reaches the precise issue involved here, namely, whether incriminating evidence obtained by compulsory interrogatories nominally directed to a corporation but which primarily concerns the activities of the officers, should be suppressed in a parallel criminal case. Rather, in both cases, the issue presented was whether the corporation was obliged to appoint an agent to furnish general corporate information without fear of incriminating the agent. The existence of an "innocent" agent was assumed, and his ability to provide corporate information was likewise assumed.

Here, no such appointment can be made and no such assumptions can be indulged in. Under the extraordinary facts of the instant case, the Government itself sought to cut through the corporate facade to get from respondents, the targets of the criminal case, information which only they could have provided.

2.

The Government's reliance upon a strict application of the general principles of corporate law is misplaced. It ignores the fact that under the Federal Food, Drug and Cosmetic Act, the legal fiction between a corporation and its officers, stockholders or employees has been virtually abolished.

The Federal Food, Drug and Cosmetic Act is unique among federal statutes in the broad range of criminal liability in that it allows liability to be imposed upon responsible corporate officers and agents regardless of knowledge or intent. See *Morissette* v. *United States,* 342 U. S. 246 (1952).

Under this Act, criminal liability is vicarious in nature and is imposed without knowledge or consciousness of wrongdoing on the part of the agents of the corporation. Criminal stigma is placed upon a person "predicated wholly upon chance, without the necessity of fraud, participation, acquiescence or even negligence." *Vicarious Criminal Responsibility,* 19 Ind. L. Rev., 265, 268; *United States* v. *Dotterweich,* 320 U. S. 277, 64 S. Ct. 134, 88 L. Ed. 48 (1943).

It has been stated that the Federal Food, Drug and Cosmetic Drug Act is an example of a public welfare offense statute wherein the elimination of intent is justified on the ground of public welfare, necessity and expediency. Criminal sanctions are deemed justifiable in order to serve as an effective means of regulation.

As was stated by this Court in the *Morissette* case, *supra,* "Such dangers have engendered increasingly numerous and detailed regulations which heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare" 342 U. S. at 254.

The leading case on the subject of the criminal liability imposed upon the agents of a corporation under the Federal Food, Drug and Cosmetic Act, is *United States* v. *Dotterweich, supra.* In that case, this Court defined the liability of officers and agents of corporations engaged in manufacturing and distributing foods and drugs allegedly in violation of the Food and Drug Act. There, this Court held that public policy required strict criminal liability upon a general class of individuals identified with the corporation without regard to criminal intent or corporeal relationships, in order that the Food, Drug and Cosmetic Act might provide an effective means of regulation in a field involving public health and safety. In that case, this Court affirmed the conviction of the president of the corporation which had repacked and shipped misbranded and adulterated goods, even though the president personally had no knowledge of the operation and the defect in the goods was not apparent on its face. In so doing, this Court set a general standard for determining the personal liability of corporate agents, which is directly contrary to the Government's position in the instant case. Thus this Court stated:

> "The Act is concerned not with the *proprietary relation to a misbranded or adulterated drug, but with its distribution.* In the case of a corporation, such distribution must be accomplished, and may be furthered, by persons standing in various relations to the incorporeal proprietor. . . . To speak with technical accuracy, under §301, a corporation may commit an offense and all persons who aid and abet its commission are equally guilty. Whether an accused shares responsibility in the business process resulting in unlawful distribution depends on the evidence produced at the trial and its submission—assuming the evidence warrants it—to the jury under appropriate guidance. The offense

> is committed . . . by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws, namely, to put into the stream of interstate commerce, adulterated or misbranded drugs." 320 U. S. at 283, 284 (emphasis added).

The Federal Food, Drug and Cosmetic Act thus virtually automatically imposes criminal liability on a broad class of persons who have responsibility for the distribution of the products involved, without regard to technical incorporeal or proprietary relationships where corporations are involved. The mere fact that corporate personnel have some responsibility for distributing the violative product is sufficient, regardless of knowledge or an awareness of any violative conduct. *United States* v. *Dotterweich, supra, Lelles* v. *United States,* 241 F. 2d 21, 24 (9th Cir. 1957); *United States* v. *Kaadt,* 171 F. 2d 600, 604 (7th Cir. 1949); *United States* v. *Parfait Powder Puff Co.,* 163 F. 2d 1008, 1009 (7th Cir. 1947).

It is submitted that under the special circumstances of the Federal Food, Drug and Cosmetic Act, the Government, in the instant case, has placed undue emphasis upon the existence of the corporation. Indeed, the argument of the Government in the instant case, is directly contrary to its position urged in the *Dotterweich* case, wherein the Government successfully argued to this Court that the Federal Food, Drug & Cosmetic Act has intentionally chosen to ignore the corporation's structure as a legal entity, and, instead, imposes criminal liability upon all officers, agents and corporation personnel who knowingly share responsibility in the business process which results in the distribution of misbranded or adulterated drugs. In reality, under the Food and Drug Act, even a nominal officer or agent may share in the responsibility for a

products' distribution, and thus be criminally liable without intent. To state it simply, in order to provide an effective enforcement of the Federal Food, Drug & Cosmetic Act this Court has chosen to pierce the corporate veil. The Government now requests that this Court reestablish this veil and adhere to formal legal fictions to deny corporate officers their privilege against self-incrimination.

Respondents do not ask this court to establish new dimensions in corporate or constitutional law. The statute involved has already destroyed the distinction between the corporation and its officers when imposing criminal liability. If the statute imposes liability upon officers, agents and employees without regard to knowledge or intent of the offense, no reason exists why the officers, agents or employees of the corporation may not invoke their Fifth Amendment privilege to avoid self-incrimination where the interrogatories are nominally directed to their corporation and concern the activities of the individuals.

The purpose of the Fifth Amendment is to protect the individual against the potential evils of compulsory disclosure. Here, the corporation and the responsible agents of the corporation are, in essence, one and the same and have been treated as such by the very statute which the Government invoked in bringing criminal action against the corporation and the respondents. The protection afforded by the Fifth Amendment transcends any difficulties that the granting of the privilege to its agents would impose in the prosecution of criminals under the Food and Drug Act.

Obstacles to the application of the Fifth Amendment privilege, which is founded upon "the high sentiment and regard our jurisprudence for conducting criminal trials

and investigatory proceedings upon a plane of dignity, humanity and impartiality" (*United States* v. *White,* 322 U. S. 694, 698 (1943), should not be lightly placed in its path.

Any agent who could answer the interrogatories here involved subjects that agent to a "real and appreciable" risk of self-incrimination under the Food and Drug Act. *Cf., Marchetti* v. *United States,* 390 U. S. 39, 48 (1968). The fact that in "uncommon" instances, the agent answering the interrogatories may not be incriminated, is no reason to deny the privilege. *Haynes* v. *United States,* 390 U. S. 85, 96-97, 99 (1968). The class of persons associated with the corporation who would have, or who could obtain, the information sought by the broad interrogatories here involved, constitute "a select group inherently suspect of criminal activities" under the *Dotterweich* rule. For any such person to answer the interrogatories would have requried that person unmistakeably to identify himself as a member of this select and suspect group, and thus to create a "real and appreciable" hazard of incrimination. *Cf, Leary* v. *United States,* — U. S. — 23 L. ed. (2) 57, 71 (1969).

3.

The Government argues that the burden of proving the non-availability of an agent willing to act for the corporation in answering the interrogatories is upon the respondents. Respondents submit that in view of the fact that the Act involved herein imposes criminal liability on all persons having responsibility for the shipment of misbranded articles, regardless of their corporeal relationships, the burden of proof as to the availability of "innocent agents" should be upon the Government. To require the corporation (and hence respondents) to make a showing as to the non-availability of an agent to sign the interrogatories, or to establish that all the information available to the cor-

poration was in fact submitted, would in all likelihood require respondents, as sole officers, to waive their privilege and testify either as to their efforts to find a volunteer or as to the information actually available. *Cf., Communist Party* v. *United States,* 331 F. 2d 807, 814 (CADC, 1963).

4.

The Government asserts that respondents' claim of privilege was waived because it was not specifically referred to in the original motion for a protective order in the civil case. Here, again, the Government relies upon form rather than substance.

Quite clearly, the dilemma confronting respondents in being required to provide information responsive to the interrogatories, albeit through their corporation, was specifically emphasized to the District Judge in the civil case. As above noted, a motion for a stay of the case, or an extension of time to answer the interrogatories pending the disposition of the threatened criminal case, was duly filed.

Moreover, on the motion to suppress the evidence and leads before the Trial Court in the instant case, the claim of privilege was specifically asserted.* In this connection, the Trial Court's first opinion on respondents' motion to suppress, specifically acknowledged that respondents had claimed "that the use of the evidence obtained in the civil case violates the Fifth Amendment privilege against self-incrimination" as well as the Fourth Amendment right

* On the written motion, respondents asserted that the use of evidence and leads obtained by compulsory discovery proceedings in the civil case constituted an unconstitutional exercise of inquisitorial authority and violated respondents' rights to a fair trial (App. 46). Counsel's supporting affidavit refers to the Government's tactics as requiring "respondents to give evidence against themselves" (App. 50). Finally, on oral argument, counsel again specifically urged that respondents had been whip-sawed into providing incriminating information (App. 26).

against the use of evidence obtained by unreasonable search and seizure (App. 53).

We submit that under all of the circumstances of this case, respondents' failure to rely specifically upon the Fifth Amendment on the motion for a protective order in the civil case does not amount to a waiver of their privilege. *Cf., Leary* v. *United States,* — U. S. —, 23 L. ed. (2) 57, 77 (1969).

C. The Procedures Used by the Government Were Inherently Unfair and Violative of Respondents' Rights of Due Process.

Quite apart from Fifth Amendment considerations, the F. D. A. must be held to have utilized civil discovery to an impermissible extent in this case. The investigation of the criminal case and civil discovery went forward on a common front, and the discovery, while nominally directed to respondents' corporation, was employed to obtain evidence, leads and admissions concerning respondents' activities directly relevant to the criminal case. Under these circumstances, an exclusionary rule against the use of the evidence and leads should have been invoked in the exercise of the Federal Court's supervisory authority over the fair administration of criminal justice. *McNabb* v. *United States,* 318 U. S. 332, 340-343 (1942); *Rea* v. *United States,* 350 U. S. 214 (1956); *United States* v. *Thayer,* 214 F. Supp. 929 (D. Colo., 1963); *United States* v. *Parrott,* 248 F. Supp. 196 (DC, 1965); F. R. Cr. P. 41(e).

As was stated in *United States* v. *Thayer, supra,* the question of using evidence obtained in a civil proceeding concerning a person who is the object of a possible criminal action, is

> "somewhat broader than possible violation of defendant's privilege of self-incrimination and that the issue is also whether the methods employed in

obtaining and reducing this testimony shows unfairness which, quite apart from the prohibitions of the Fifth Amendment, render the evidence so obtained inadmissable." *Id* at 930.

Respondents submit that the instant case presents overriding and compelling considerations, founded upon sound public policy and substantial justice, for suppressing evidence and leads obtained by compulsory discovery nominally directed to a corporation, but designed to elicit information against the officers at the very time that a criminal action is threatened against those officers. Indeed, numerous cases hold that even under less compelling circumstances, the requirement to make discovery should be postponed until after the disposition of the criminal case, *United States* v. *Lipschitz,* 132 F. Supp. 514 (EDNY 1955); *United States* v. *Bridges,* 86 F. Supp. 931 (N. D. Cal., 1949); *United States* v. *A. B. Dick Co.,* 7 FRD 442; *United States* v. *Linen Supply Institute of Greater New York,* 18 FRD 452 (SDNY); *Paul Harrigan and Sons* v. *Enterprise Animal Oil Co., Inc.,* 18 FR Serv. 33.325 Case 1 (EDPA, 1953); *Penn* v. *Automobile Insurance Co.,* 27 F. Supp. 336 (Ore., 1930). If discovery has been made, at the very least, the evidence obtained therefrom should be suppressed in the companion or parallel criminal case. *Blue* v. *United States, supra; Boyd* v. *United States, supra; The Saline Bank, supra.*

These cases are founded upon public policy, rooted in historical and settled concepts of anglo-saxon criminal jurisprudence that a defendant or prospective defendant should not be required to disclose evidence to sustain the prosecution against him in a criminal case or his evidence of defense. This is not solely a matter of privilege against self-incrimination, but rather it is an expression of the policy and principles of a free Government which, in criminal cases, opposes inquisitorial procedures. *United States* v. *Boyd, supra,* at 632.

Here, there is involved a shocking example of agency indifference to abusive inquisitorial authority which the government has chosen to minimize if not ignore.

The critical facts upon which the reversal by the Court of Appeals of respondents' convictions rested, were that the civil case and the investigation of the criminal case had gone forward on a common front. Information obtained in the civil case was transmitted to those in charge of the criminal investigation. The initial recommendation for criminal prosecution had not been made until after the District Judge had ordered the interrogatories, which were far broader than would ordinarily be needed in a civil case, to be answered in the civil case. The recommendation to indict respondents was not made until after the answers were received. The interrogatories had been prepared by Mr. Randolph of the Food and Drug Administration in Washington, who also made the decisions to recommend criminal action against the respondents. The answers to the interrogatories had been sent to Mr. Randolph and the indictment was prepared in Mr. Randolph's office.

In short, in this case there was a complete commingling of functions between the person preparing the interrogatories and the person responsible for investigating the criminal case and recommending criminal prosecution—indeed, they were one and the same person.

The government acknowledges that the existence of parallel civil and criminal proceedings "imposes delicate problems" (Pet. Br., p. 25) which require great "care" to protect a prospective defendant against unfair inquisitorial tactics. It argues, however, that there was no unfairness in this case because the civil action was necessary to protect the public and bring the suit promptly to judgment so that the FDA could invoke multiple seizures under 21 U. S. C. 334 to prevent the marketing of additional quantities of the mis-branded articles (Pet. Br., p. 14).

The Government's contention, however, overlooks its own rationale, on page 33 of its brief, that civil proceedings should not go forward where a criminal action is threatened, if the public interest can be protected by means of interim relief, such as a preliminary injunction, which is available, for example, in securities fraud cases.

The fact is that interim injunctive relief to immediately protect the public interest is also available under the Federal Food, Drug and Cosmetic Act. See 21 U. S. C. 332. In the instant case, no injunctive relief, interim or otherwise, was ever sought, from the moment the civil case was filed in June 1960, until the case was terminated by a consent judgment in November, 1962. During that period, the Government did nothing to prevent the marketing of additional articles, and its sole action was to press relentlessly forward to obtain answers to the more than 2,000 questions contained in its interrogatories, while at the same time moving forward with its plans to indict respondents.

Nor did the Government invoke multiple seizures after the entry of the consent judgment.* Indeed, the consent judgment contained a specific provision authorizing the alleged mis-branded articles to be re-labelled so that these same articles could be resold to the public. Clearly therefore, the case involved no threat whatever to the safety and health of the public from the continued sale of the products, but merely involved a technical question as to whether Kordel's lectures and personal writings had served to mis-brand the articles.

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* Multiple seizures are also permitted without a prior judgment where the Secretary of the Department of Health Education and Welfare determines the need to safeguard the public interest. No such determination was made and none was sought. The situation therefore, could not have been deemed "critical", and could hardly have justified the Government's mis-use of discovery proceedings in the instant case.

Moreover, it is not with significance to note that the consent decree which terminated the civil action, contained an exculpatory provision by which the Government acknowledged that its entry would not constitute an admission that the Federal Food, Drug and Cosmetic Act had been violated. Yet, by utilizing the evidence and leads in the preparation and prosecution of the criminal case based upon the identical acts of wrongdoing, the Government accomplished precisely that which it said was not to be implied by the consent decree.

The Government's claim that it needed the answers to the interrogatories to prepare the groundwork for summary judgment and that it acted in good faith, stands on no better footing. The fact is, as above noted, that a motion for summary judgment was never made. This failure would appear to negate the Government's claim that it was already in possession of all of the information necessary, without the need for interrogatories, to succeed in the civil case, let alone the criminal case.

Further, the rule urged by the Government that evidence obtained under the circumstances of the instant case may be used in a criminal prosecution, merely because one of the purposes for its acquisition may be to lay a foundation for summary judgment, is replete with substantial possibilities of abuse. The filing of a civil suit is a commonplace and simple procedure for the law enforcement section of the FDA to pursue. An inquiry into the *bona fides* of such a suit invites fruitless litigation into official motives and official purposes. See, *Abel* v. *United States,* 362 U. S. 217, 254, 255 (1960) (dissenting opinion). It must be recognized that the power to commence a civil suit upon the mere filing of a complaint "is so unconfined by any safeguards that it cannot be countenanced as consistent with the Fourth Amendment", *Abel* v. *United States, supra,* at 254 (dissenting opinion) par-

ticularly, where, as here, compulsory admissions and evidence of essential elements were sought at the same time that a criminal case was contemplated.

Here, while the answers to the Government's interrogatories was required by the District Judge in the civil case, the order to answer the interrogatories was entered in reliance upon the Government's representation that formal criminal proceedings, while under consideration, had not yet been, and might never be, instituted. Such a contention, while perhaps justifying the District Judge's order requiring the filing of answers to the Government's interrogatories, does not justify *the use* of such answers in the criminal case. Such logic would allow the Government to utilize civil discovery to obtain evidence in all criminal cases. If such evidence is adequate to sustain the criminal case, the criminal case will be brought. If such evidence is inadequate, then of course, formal criminal proceedings might not ever be instituted. The compelling facts here, however, are that at the very time that the civil case was pending and interrogatories served, the FDA had under consideration the bringing of a criminal case for the identical offense and the answers to interrogatories filed in the Court were at Randolph's request, forwarded to him. Randolph handled the criminal prosecution and recommended that respondents be prosecuted.

The Government further argues that the Court of Appeals laid down a *per se* rule against the bringing of parallel civil and criminal proceedings, and thus has unduly hampered the work of many agencies. The Court of Appeals did not hold, and respondents do not contend, that agencies may not institute and prosecute civil proceedings on offenses that may also involve a possible criminal proceeding against the same person. Rather, what is involved here is a Government search for criminal acts committed by officers of a corporation conducted under the guise of discovery pro-

cedures nominally directed to their corporation, and undertaken for ostensible civil purposes. Even under such circumstances, respondents do not contend that the civil case may not go forward, if necessary to protect the public interest, and discovery filed. Respondents submit only that the evidence obtained by such discovery should be suppressed in a criminal case simultaneously threatened or pending at the time the discovery is sought and where the same person is in charge of both cases, to prevent the use of inquisitorial procedures which are abhorrent to civilized standards of criminal justice. In fact, even under less compelling facts, this is precisely the remedy suggested by this Court in *Blue* v. *United States*, 384 U. S. 251 (1966). See also, *United States* v. *Thayer, supra, United States* v. *Parrott, supra.*

Petitioner argues that all of the evidence used in preparing and prosecuting the criminal case was obtained by independent investigation and that evidence and leads obtained by the interrogatories were not used. The same argument was made to, and rejected by, the Court of Appeals, which stated as follows:

> "We find no tangible support in the record for this statement. It is admitted by Mr. Fowler, the Government agent on whose testimony the indictment was returned—he was the only witness who appeared before the grand jury, that he used the answers to the interrogatories in preparing his testimony before the grand jury. There is no showing by the Government that any attempt was made at any stage of the proceedings to separate the two cases. There is no testimony or avowal by those who investigated and prosecuted the criminal case that they failed to use evidence and leads obtained through answers to the interrogatories. It is admitted by the Government witnesses that in the

enforcement of the Federal Food, Drug and Cosmetic Act it is not unusual for the Government first to commence a civil action and then use information obtained in that case in parallel criminal proceedings. Information obtained from whatever source is placed in one general file. We note, too, that the interrogatories submitted by the Government were broader than would ordinarily be needed in a civil case. Some of the interrogatories were directed specifically toward the activities of Lelord Kordel, president of Detroit Vital Food, Inc., and the principal defendant in this case. We conclude from this record that evidence and leads obtained by reason of the interrogatories were used against the defendants in the criminal case" (App. 368, 369).

We further submit, that if, as the Government asserts, its evidence was obtained by independent investigation, respondents can be retried without too much difficulty.

D. The Cases Cited by the Government are Inapposite.

The reliance by the Government upon *United States* v. *Simon,* 373 F. 2d 649 (C. A. 2) is misplaced. In that case, in contrast to the instant case, the Court of Appeals expressly noted the absence of any "consultation on lines of questioning" between the person responsible for handling the civil case and the person responsible for the criminal case. 373 F. 2d at 652.

The Government's reliance upon *United States* v. *Parrott,* No. 66 Cr. 243 (S. D. N. Y., Feb. 14 1969), is likewise misplaced. In that case, discovery was utilized by the agency at a time when no consideration of criminal prosecution against the defendant had been given. In the case at bar, however, not only was the Government considering

criminal prosecution of the defendants at the same time that discovery was utilized in the civil case, but the very same person handled both.

United States v. *Sclafani,* 265 F. 2d 408 (C. A. 2, 1959) is inapposite. In that case, agents of the Internal Revenue Service requested permission to examine records of a taxpayer in a routine audit. The taxpayer voluntarily turned over his books. The IRS request was not a ruse to deceive the taxpayer, nor was the taxpayer subjected to a compulsory order of production which would result in a forefeiture of property upon refusal.

United States v. *Light,* 394 F. 2d 908, (C. A. 2, 1968) merely involved a consent to the delivery of public books and records which were required to be kept under the Securities and Exchange Act. No forfeiture of property was involved, nor was there any attempt to obtain information or admissions as to the personal activities of officers of a corporation under the guise of interrogatories nominally directed to the corporation.

United States v. *Squeri,* 398 F. 2d 785 (C. A. 2 1968), merely involves the voluntary appearance of a defendant and his accountant before the Internal Revenue Service where he voluntarily made numerous admissions which were subsequently used against him in a criminal proceeding.

Finally, *United States* v. *Jaskiewicz,* 278 F. Supp. 525 (E. D. P. A. 1968) and *Silver* v. *McCamey,* 221 F. 2d 873 (CADC, 1955) cited by the Government (Pet. Br. 33), actually support respondents' position. In both cases, the point is made that criminal and civil proceedings should not even be simultaneously considered where there is no immediate threat to the public. As above noted, no immediate threat was involved in the instant case.

Respondents respectfully submit, that on the record of the instant case, and the unusual circumstances here pre-

sented, the Court of Appeals correctly concluded that the evidence and leads obtained by compulsory discovery were designed to "get at" respondents and should have been suppressed in the parallel criminal case against respondents. The tactics used by the government were inherently unfair.

If ever there was a case where the District Court had in fact decreed a discovery which provided evidence of a criminal offense, this is such a case. If ever there was a case where a compulsory discovery was utilized with knowledge, intent and design that it be used to provide evidence of a criminal offense, this is such a case. If ever there was a case where the fair administration of criminal justice, not to speak of the Fourth and Fifth Amendments, cries out desperately for the application of an exclusionary rule, this is such a case.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals should be affirmed. If this honorable Court determines otherwise, the case should be remanded to the Court of Appeals to consider the other grounds of assigned error argued to that Court but apparently not passed upon by it (App. 364).

Respectfully submitted,

SOLOMON H. FRIEND
Attorney for Respondents.

On the Brief,
SHELDON S. LUSTIGMAN

October, 1969.

Appendix A to Brief of Respondent

NOTICE OF HEARING

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
FOOD AND DRUG ADMINISTRATION
1560 E. Jefferson Ave., Detroit 7, Mich.

In reply refer to
Sample Numbers 21-129 R et al
Health Foods

January 19, 1961

Detroit Vital Foods Inc., and
Lelord Kordel, and
Alfred J. Feldten
20731 W. 7 Mile Rd.
Detroit, Michigan

Gentlemen:

Investigation by this Administration indicates your responsibility for violation of the Federal Food, Drug, and Cosmetic Act, as described in the attached Charge Sheet, with respect to the following:

Consignment of articles of drugs labeled in part:

21-129 R

"Vitamins—Minerals Nutri-Time A Dietary Food Supplement 90 Tablets", shipped by Kapco Inc. Kalamazoo, Michigan to Detroit Vital Foods Inc., Detroit, Michigan prior to March 29, 1960. The article was manufactured by Kapco Inc. from ingredients which had been, in part, received in interstate commerce.

Appendix A

21-131 R

"Vital Foods * * * 100 Whey-Plus Tablets", shipped by Kapco Inc., Kalamazoo, Mich. to Detroit Vital Foods Inc., Detroit, Michigan prior to March 30, 1960. The article had been compounded by Kapco Inc., from ingredients which were, in part, received from interstate sources.

21-132 R,
21-145/6 R.

"Lelord Kordel's (or Vital Foods Special Brand) 'Frutex' Fruit Salad Natural Organic Vitamin C Wafers", shipped by Savoy Drug & Chemical Co. Chicago, Illinois to Detroit Vital Foods Inc., Detroit, Michigan on or about 1/12/60, 3/4/60, 3/25/60 and 3/28/60.

21-133 R,
21-144 R

"Mich. Brand Korleen Tablets", shipped by Freshman Vitamin Co. Oak Park, Michigan to Detroit Vital Foods Inc., Detroit, Michigan, on or about March 1, 1960. The article had been manufactured from active raw ingredients received in interstate commerce.

21-134 R

"Lelord Kordel's 100% Natural and Organic Super Protein Aminex", shipped by Savoy Drug & Chemical Co., Chicago, Illinois to Detroit Vital Foods Inc., Detroit, Michigan, on or about March 18, 1960.

21-136 R,
21-147 R

"Michigan Brand of A-Ribo Tablets", shipped by Kapco Inc., Kalamazoo, Michigan to Detroit Vital

Appendix A

Foods Inc., Detroit, Michigan prior to 4/4/60. The articles had been manufactured by Kapco Inc. from active raw ingredients received from interstate sources.

21-141 R

"Vital Foods Special Brand Lecigen Lecithin Granules", shipped by Savoy Drug & Chemical Co. Chicago, Illinois to Detroit Vital Foods Inc., Detroit, Michigan, on or about February 26, 1960.

An informal hearing will be held on Wednesday, February 1, 1961, at 2:00 p.m. (EST) at 1560 E. Jefferson Ave., Det. 7, Mich. to give you an opportunity to present your views in the matter. The enclosed Information Sheet explains the purpose and nature of the hearing, and how you may reply. If no response is received on or before the date set, our decision on whether to refer the matter to the Department of Justice for prosecution will be based on the evidence at hand.

By direction of the Secretary of the Department of Health, Education, and Welfare:

GEO. T. DAUGHTERS
Geo. T. Daughters
Chief of District

Enclosures

Legal Status Sheet
Charge Sheet
Information Sheet

(Important: Note All Enclosures Carefully)

cc: Lelord Kordel, and Alfred J. Feldten, w/cc Charge Sheets & Info Sheet

Appendix A

Prohibited Act:

Section 301(k) of the Federal Food, Drug, and Cosmetic Act. The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being misbranded or adulterated.

Charges:

The articles are violative in the following respects:

21-119 R

Its labeling is false and misleading in that statements and representations therein, namely, books "Eat and Grow Younger" and "How to Make People Like You" and booklet "An Invitation to health the Easy Way" which when viewed in their entirety or through specific claims represent and suggest that it is difficult, if not impossible to obtain adequate nutrition from the diets of ordinary food due to the poor quality of soil in which grown; that growing and marketing practices and home preparation of meals results in practically everyone suffering from, or being in danger of suffering from, inadequate vitamin and mineral nutrition unless one takes a vitamin and mineral supplement; for a supplement to be nutritionally effective it should contain a minimum of 72 vitamins and minerals; that all ills or diseases of mankind are due to one or more vitamin or mineral deficiencies; that it furnishes all the ele-

ments necessary to insure good health, whereas the article would not be effective for treating or preventing these conditions.

21-129 R

Directions for use are inadequate for arthritis, loss of energy, blood disorders, palpatation of the heart, removing mucous, heavy thighs and upper arms, for localizing overweight, kidney stones, colds, sinus trouble, thyroid conditions, nervousness, night blindness and eye health, which are the diseases symptoms and conditions for which the article was held out during a series of lectures given by Lelord Kordel at the Masonic Temple and Fort Wayne Hotel, Detroit, Michigan during the period March 29, 1960 through April 8, 1960.

21-131 R

Directions for use are inadequate for bad breath, internal sweetening, intestinal fermentation, stomach ulcers, and removing of accumulations of mucous, which are the diseases symptoms and conditions for which the article was held out during a series of lectures given by Lelord Kordel at the Masonic Temple and Fort Wayne Hotel, Detroit, Michigan during the period March 29, 1960 through April 8, 1960.

21-132 R, 21-145/6 R

Its labeling, namely, leaflets entitled "Is this a new way to Strengthen Your Heart?", "Some interesting Testimonials from Enthusiastic Followers" and "Special Lecture Prices" and books entitled "Eat and Grow Younger" and "How to Make People Like You" is false and misleading in that they con-

tain statements which represent and suggest that the article is inadequate [sic] and effective treatment for preventing premature aging; and to strengthen the artery walls and aid in reducing high blood pressure; that it plays a big part in controlling the effect of brain fag by contributing to the health of the blood vessels of the brain and body; contributes to the health of the blood vessels in the brain and body, and aids in controlling brain fag, since the article would not be an effective treatment for these conditions and purposes.

Directions for use are inadequate for the treatment and prevention of air and food borne poisonings; impaired circulation; common colds, fatique [sic]; alcoholism; nose bleeding; blood-shot eyes; capilliary fragility; loose teeth; sneezing; pyorrhea; to prevent old age; hold cells together; neutralize the effects of cigarettes smoke and impure air; prevent blood vessels and capillaries from bursting; prevent cells within the retina from breaking down; improve the condition of the blood vessels, help blood circulation; neutralize the toxins in aspirin tablets; which are the diseases symptoms and conditions for which the article was held out during a series of lectures given by Lelord Kordel at the Masonic Temple and Fort Wayne Hotel, Detroit, Michigan during the period March 29, 1960 through April 8, 1960.

21-133 R, 21-144 R

Its labeling, namely, the leaflet and books previously enumerated under 21-132 R and 21-145/6 R, is false and misleading in that it contains statements which represent and suggest that the article is an adequate and effective treatment for hardening of the arteries;

defatting the arteries; liver and kidney troubles; heart attack; stroke; hemorrhage of the heart or liver; alcoholism; varicose veins; pains and cramps of varicose veins; old age; gall bladder diseases; and lowering of blood cholesterol; since the article is not an adequate and effective treatment for such conditions and purposes.

Its labeling does not contain adequate directions for use for the treatment in prevention of varicose veins; poor circulation; cholesterol and fatty deposits in the arteries; abnormal arteries; hardening of the arteries; degeneration of the liver; gall bladder diseases; cirrhosis of the liver; overweight and underweight; high blood pressure; arteriosclerosis; fibroid tumors of the uterus; spots on the liver; brown pigmentation spots on the skin; prostate gland trouble; which are the diseases; symptoms and conditions for which the article was held out during a series of lectures given by Lelord Kordel at the Masonic Temple and Fort Wayne Hotel, Detroit, Michigan during the period March 29, 1960 through April 8, 1960.

21-134 R

Directions for use are inadequate for infections, reducing, tissue repair, normal blood supply and reducing; to promote growth, aid women to become pregnant and for enzyme production; which are the diseases symptoms and conditions for which the article was held out during a series of lectures given by Lelord Kordel at the Masonic Temple and Fort Wayne Hotel, Detroit, Michigan during the period March 29, 1960 through April 8, 1960.

Appendix A

21-136 R,
21-147 R

Its labeling is false and misleading in that the statements and representations in its labeling, namely, leaflets "Some Interesting Testimonials From Enthusiastic Followers" and "Special Lecture Prices" represent and suggest that the article is an adequate and effective treatment for drainage of inflamed and irritated eyes, and to enable one to discard eye glasses within 5 or 6 months after starting to take A-Ribo, since the article would not be an effective treatment for these conditions and purposes.

Directions for use are inadequate for eye conditions, stimulating the eyes, for eye strain, for the octive nerve, for colds, sinus trouble and night blindness, which are the diseases symptoms and conditions for which the article was held out during a series of lectures given by Lelord Kordel at the Masonic Temple and Fort Wayne Hotel, Detroit, Michigan during the period March 29, 1960 through April 8, 1960.

21-141 R

Its labeling is false and misleading in that statements and representations in the labeling, namely, books "How to Make People Like You" and "Eat And Grow Younger" when viewed in their entirety as well as through specific claims represent and suggest that the article is an adequate and effective treatment for burning up accumulated cholesterol deposits, or to prevent them, for added vitality, fights fatigue, increased personality and improved brain function, prevents nervousness, sexual decline,

brain fag, nervous exhaustion, headaches, impotence, sterility, and senility; for heart and blood vessels diseases, anemia, rheumatic carditis, diseases of the liver and kidney disorders, for shattered nerves, depleted brain power, and wanning activity of vital glands, since the article would not be an adequate and effective treatment for these conditions and purposes.

21-141 R

Directions for use are inadequate for burning up accumulations of fat clogging blood vessels, varicose veins, prostate difficulties, hardening of the arteries, poor circulation, nervousness, preventing fatigue, mental alertness, hormone production, skin pigments and constipation, which are the diseases symptoms and conditions for which the article was held out during a series of lectures given by Lelord Kordel at the Masonic Temple and Fort Wayne Hotel, Detroit, Michigan during the period March 29, 1960 through April 8, 1960.

All Nos.

Its l a b e l i n g, namely, books "Eat and Grow Younger" and "How to Make People Like You" and booklet "An Invitation to Health The Easy Way" is false and misleading in that it contains statements which represent and suggest that nearly everyone in this country is suffering from malnutrition or in danger of such suffering because of demineralized, eroded and depleted soils, and by the refining, improper processing, and storage of foods; that the diet should be forfeited with additional quantities of minerals and vitamins are in excess

of amounts recommended for adequate nutrition, will provide additional benefits to persons in good health, and will assist in returning a sick or injured person, or one convalescing from an operation to good health; that the body has a greatly increased need for vitamins and minerals when the individual is under mental stress, tension, or strain, is physically fatigued, or is suffering from injury, infection, or illness, or is undergoing surgery, and which increased need is an indication for the use of excess quantities of vitamins and minerals offered by the products, since these statements are contrary to fact.

GRF/mmj
1/20/61

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

FOOD AND DRUG ADMINISTRATION

INFORMATION SHEET IN CONNECTION WITH ENCLOSED NOTICE OF HEARING

OBJECT OF THE HEARING

This hearing is scheduled to give the person or persons who appear to be responsible for the violations of the Federal Food, Drug, and Cosmetic Act as specified in the attached Charge Sheet an opportunity to explain *voluntarily* any circumstances connected with the preparation, handling, shipment, or sale of the articles involved which

would indicate that criminal action should not be taken. Any civil action which may have been taken against the goods involved, such as seizure, does not preclude prosecution of those responsible for the violation; the hearing concerns the possible criminal action only. A copy of the Federal Food, Drug, and Cosmetic Act and regulations for its enforcement may be had upon request.

NATURE OF THE HEARING

This hearing is informal and confined to questions of fact. For your convenience in submitting required information concerning the status of your firm both on the date of response to this notice and on the date of alleged violation, the attached Legal Status forms should be filled out and returned with your answer. Your answer may consist of the disclosure of any pertinent facts, letters, files, guaranties, shipping documents, analyses, arguments, etc., which you feel may present valid reasons why you should not be prosecuted.

GUARANTIES [sic]

In the case of articles that are adulterated or misbranded when introduced in interstate commerce the Federal Food, Drug, and Cosmetic Act places responsibility on the interstate shipper, even though he may be only the distributor and not the manufacturer. Distributors may relieve themselves of responsibility if they hold a legal guaranty under Section 303 (c) of the act. If the articles were sold to you by a person residing in the United States and guaranteed by such person to comply with the provisions of the act, you should submit—

Evidence of that fact, and

A statement as to whether the product at the time of the apparent violation by you was in the

identical condition and bore the same labels as when received by you from the guarantor, and

The full name of the person who, if called upon, can identify pertinent records and testify to the facts as you represent them.

How to Answer

You may appear in person or by attorney or other designated representative, or you may submit your response in the form of a letter in lieu of personal appearance. If written response is made, please submit your letter and all accompanying documents in *triplicate.* Documents submitted at personal appearance should also be in *triplicate. All documents should be conspicuously identified by the reference number shown on the upper right corner of the Notice of Hearing.*

Result of the Hearing

After the hearing has been held and all the facts considered, if it is the conclusion of the Secretary of the Department of Health, Education, and Welfare that prosecution should be recommended, the facts in the matter will be transmitted to the Department of Justice for appropriate action.

Appendix A

NOTICE OF HEARING

DEPARTMENT OF

HEALTH, EDUCATION, AND WELFARE
FOOD AND DRUG ADMINISTRATION

In reply refer to
32-363/66 R et al

cc: Mr. Lelord Kordel with cpy
Charge Sheet & Information Sheet

April 19, 1961

Vital Foods, Inc.
22200 Grand River Ave.
Detroit, 19, Michigan
and Mr. Lelord Kordel

Investigation by this Administration indicates that violation of the Federal Food, Drug, and Cosmetic Act has occurred, as shown in the attached charges, with respect to the following:

> Fifteen consignments of products identified on pages 2 and 3 attached.

The facts in our possession indicate your responsibility for the violation. An opportunity will be given you on Thursday, April 27, 1961, at 2 PM. in Room 1200, 201 Varick Street, New York 14, NY, to present informally your views with respect to the charges before a decision is reached as to whether the matter should be referred to the Department of Justice for prosecution. You may appear in person or by attorney, or you may submit your response to this notice in the form of a letter in lieu of

personal appearance. If written response is made, please submit your letter and all accompanying documents in triplicate. Documents submitted at personal appearance should be in triplicate. If no response is received on (or before) the date of the hearing, the matter will be decided on the evidence at hand.

By direction of the Secretary of the Department of Health, Education, and Welfare:

F. K. KILLINGSWORTH
F. K. Killingsworth
Deputy Director of District.

Enclosures

Legal Status Form
Charge Sheet
Information Sheet

MEB

(Important: Note All Enclosures Carefully)

Appendix A

NOTICE OF HEARING

DEPARTMENT OF

HEALTH, EDUCATION, AND WELFARE

FOOD AND DRUG ADMINISTRATION

In reply refer to
32-375 R et al

April 19, 1961

Mr. Alfred Feldten
c/o Vital Foods Inc.
22200 Grand River Ave.
Detroit 19, Michigan

Investigation by this Administration indicates that violation of the Federal Food, Drug, and Cosmetic Act has occurred, as shown in the attached charges, with respect to the following:

Consignment of an article labeled in part: "Lelord Kordel's Vitamins. Minerals Nutri-Time A Dietary Food Supplement 90 Tablets * * * "shipped by Detroit Vital Foods, 22200 Grand River, Detroit, Michigan, to Peter J. Colucio, 303 Van Saun Drive, River Edge, NJ, on Mar. 23, 1960 (32-375 R).

Consignment of an article labeled in part: "Lelord Kordel's 100% Natural and Organic Super Protein Aminex * * * 100 Wafers * * *", shipped by Detroit Vital Foods, 22200 Grand River, Detroit, Mich., to Peter J. Colucio, 303 Van Saun Dr., River Edge, NJ, on or about Mar. 23, 1960. (32-377 R).

Consignment of an article labeled in part: "Lelord Kordel's 'Frutex' Fruit Salad Natural Organic Vitamin C 30 Wafers * * *", Detroit Vital Foods, 22200 Grand River, Detroit, Mich., to Peter J. Colucio, 303 Van Saun

Appendix A

Drive, River Edge, NJ, on or about Mar. 23, 1960. (32-376 R).

The facts in our possession indicate your responsibility for the violation. An opportunity will be given you on Thursday, April 27, 1961, at 2 PM, in Room 1200, 201 Varick St., New York 14, NY, to present informally your views with respect to the charges before a decision is reached as to whether the matter should be referred to the Department of Justice for prosecution. You may appear in person or by attorney, or you may submit your response to this notice in the form of a letter in lieu of personal appearance. If written response is made, please submit your letter and all accompanying documents in triplicate. Documents submitted at personal appearance should be in triplicate. If no response is received on (or before) the date of the hearing, the matter will be decided on the evidence at hand.

By direction of the Secretary of the Department of Health, Education, and Welfare:

F. K. KILLINGSWORTH
F. K. Killingsworth
Deputy Director of District.

Enclosures

Legal Status Form
Charge Sheet
Information Sheet

MEB

(Important: Note All Enclosures Carefully)

Appendix A

CHARGE SHEET

32-375 R, Nutritime
32-377 R, Aminex
32-376 R, Frutex

Prohibited Act:

Section 301(a) of the Federal Food, Drug, and Cosmetic Act. The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.

The articles are violative in the following respects:

(32-375 R)

The product Nutritime is misbranded because its label fails to bear adequate directions for use for brittle bones, rickets in children, nerve and muscle health, eye health, anemia, poor mentality, insomnia, general weakness, impaired respiration, constipation, weak kidneys, female disorders, goiter, insanity nervousness, tonsillitis and overweight; aids in maintaining normal heart health, warmth, vitality, magnetism and stamnia; controls clotting of the blood and for many other conditions and diseases, for which diseases and conditions it was recommended orally by Mr. Kordell in his lectures in New York from March 7 through March 17, 1960. Nutritime is further misbranded under 502(a) by labeling accompanying said article, namely, books, "Live to Enjoy the Money you Make", "Eat Your Troubles Away", "Eat and Grow Younger", and "Health Through Nutrition" when viewed in their entirety and through specific claims, and in the setting in which they are employed represent and sug-

gest that the article is an adequate and effective treatment for and prevention of practically all diseases and ailments of mankind, including, but not limited to heart diseases, high blood pressure, hardening of the arteries, combatting infections, prevents bones from softening, insomnia, helps in toning up blood vessels; for adrenal glands, poor circulation, arthritis, fever and aches and pains accompanying fever, sore throat, earache, pharyngitis, swollen neck glands, pneumonia and acute rheumatism, ulcers of the stomach, kidney disorders, chronic fatigue, overcoming sexual weaknesses; for controlling diabetic gangrene, fatigue, irritability, nervous exhaustion and brainfag; for speeding up the healing of wounds after surgery, poor posture and constipation, which statements are false and misleading since the article is not adequate and effective for such purposes.

(32-377 R)

Aminex is misbranded because its label does not bear adequate directions for use for helping to form antibodies, for fighting infections, for aiding digestion, for muscle building after middle age for which diseases and conditions it was recommended orally by Mr. Kordel in his lectures in New York from March 7 through March 17, 1960.

(32-376 R)

Frutex is misbranded because its label does not bear adequate directions for use for neutralizing the results of toxins in tainted foods and impure air; for overcoming toxins due to spray residues; for

fever, and aches and pains of fevers; maintaining characteristics of youth; for forming intercellular substances in bones, teeth, arteries and capillaries; for preventing common colds, fatigue, alcoholism and infections; for overcoming brittleness and fragility of blood vessels and capillaries and as an aid in the healing of wounds, for which diseases and conditions it was recommended orally by Mr. Kordel in his lectures in New York from March 7 through March 17, 1960.

The article (Frutex) is misbranded under 402(a) in that its labeling, leaflet entitled "Special Lecture Prices" accompanying the article, contains a vignette depicting natural ripe fruit, the statement "made with 16 fruits" and listing of ingredients represent and suggest that the article is made from fresh fruits, which is false and misleading since the article is not made from fresh fruits.

The article is further misbranded under 403(a) in that the label statement "Fruit Salad" with the listing of ingredients on the label and the inclusion in the composition of the article of the ingredients acerola berry, apple, lemon, orange, apricot, peach, date, fig, grapefruit and prune powders, which represent and suggest that the article would supply to the diet the nutritive factors in a serving of the ingredients in their fresh state, is false and misleading, since the designated amount of the article to be consumed would not provide the nutritional factors supplied by a serving of such ingredients in their fresh state.

Frutex is further misbranded under 403(a) in that the statements "natural organic vitamin c" con-

tained in label and in the labeling, to wit, the leaflet entitled "Special Lecture Prices" which accompanies the article, represent and suggest that the Vitamin C content of the article is natural organic vitamin C and is derived solely from the fruit ingredients contained in the article; which representations and suggestions are false and misleading, since all the vitamin C in the article is not natural organic Vitamin C and is not derived solely from the fruit ingredient in the article.

Frutex is further misbranded under 403(a) in that label statement "Rose Hips Vitamin C" represents and suggests that the article contains substantial quantities of vitamin C derived from Rose Hips, which representation and suggestion is false and misleading since the article contains little or no vitamin C from Rose Hips.

(32-376 R)

Frutex is misbranded under 502(a) in that its labeling, namely, the leaflet "Special Lecture Prices" and the books entitled "Eat and Grow Younger", "Eat Your Troubles Away", "How to make People Like You", "Live to Enjoy the Money You Make", and "Health Through Nutrition," accompanying said article, contains statements which represent and suggest that the article is an adequate and effective treatment for preventing premature aging, and to strengthen the artery walls and aid in reducing high blood pressure; for the development of women's breasts; for stomach ulcers; for the treatment of gall bladder sufferers; for preventing

sore throat, earache, pharyngitis, swollen neck glands; pneumonia and acute rheumatism; for preventing and treating epidemic dysentary, hematura, and hay fever; for increasing physical endurance, lessen fatigue, and combats the effect of heat; that it is a detoxifying agent and tissue mender; that it plays a big part in controlling the effects of brain fag by contributing to the health of the blood vessels of the brain and body; helps prevent profuse menstruation and menstrual pain; reduces the death rate from typhoid fever; and prevents and controls colds, chills, fever, polio and influenza; which statements are false and misleading since the article is not an adequate and effective treatment for such conditions and purposes.

FKK:MEB

Appendix A

NOTICE OF HEARING

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
FOOD AND DRUG ADMINISTRATION
1560 E. Jefferson Ave., Det. 7, Mich.

In reply refer to

Sample Number
20-114 R, 20-119 R

September 25, 1961

Detroit Vital Foods, Inc.,
Lelord Kordel
Alfred J. Feldten
20731 W. 7 Mile Rd.
Detroit, Michigan

Gentlemen:

Investigation by this Administration indicates your responsibility for violation of the Federal Food, Drug, and Cosmetic Act, as described in the attached Charge Sheet, with respect to the following:

(20-114 R)

> "Mich. Brand Korleen Tablets 60 tablets $3.00 Lelord Kodel of Michigan—Detroit, shipped by Freshman Vitamin Co., Oak Park, Mich. and in the possession of Lelord Kordel, Detroit, Michigan on April 5, 1961—The article was manufactured from active raw ingredients shipped in interstate commerce.

Appendix A

20-119 R

"Lelord Kordel's Frutex Vitamin C in a Natural Organic Base Nutrition Enterprises Distributors Chicago", shipped by Savoy Drug and Chemical Co., Chicago, Ill., and in the possession of Lelord Kordel, Detroit, Michigan on April 10, 1961.

An informal hearing will be held on Tuesday, October 10, 1961, at 2:00 p. m. (EST) at 1560 E. Jefferson Ave., Detroit 7, Michigan. to give you an opportunity to present your views in the matter. The enclosed Information Sheet explains the purpose and nature of the hearing, and how you may reply. If no response is received on or before the date set, our decision on whether to refer the matter to the Department of Justice for prosecution will be based on the evidence at hand.

By direction of the Secretary of the Department of Health, Education, and Welfare:

GEO. T. DAUGHTERS
Geo. T. Daughters
Chief of District

Enclosures

Legal Status Sheet
Charge Sheet
Information Sheet

(Important: Note All Enclosures Carefully)

cc: Lelord Kordel, & Alfred J. Feldten, w/cc Charge Sheet & Info. Sheet 3cc: Ad w/Orig & 2 cc Charge Sheet

Appendix A

CHARGE SHEET

Sample Number 20-114R-Korleen
20-119R-Frutex

Prohibited Act:

Section 301(k) of the Federal Food, Drug, and Cosmetic Act. The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being misbranded or adulterated.

Charges:

The articles are violative in the following respects:

(20-114 R)

Directions for use are inadequate for improved circulation, varicose veins, heart ailments, high blood cholesterol, circulatory disorders, high blood pressure disturbances, as an aid to burning up fatty accumulations and helping to rid body of old fats, brown spots of the skin (liver spots), improve function of the glands of pigmentation; which are the diseases, symptoms and conditions for which the article was held out during a series of lectures given by Lelord Kordel at the Masonic Temple and Fort Wayne Hotel, Detroit, Michigan. During the period April 4 through April 14, 1961.

(20-119 R)

Directions for use are inadequate for soft receding and bleeding gums, as a fighter and neutralizer of toxins, to results of stress, bleeding gums, as an essential substance in

Appendix A

the development of tissues from protein, mild scurvey, capilliary fragility, nosebleeds, for strengthening walls of blood vessels, as an aid in cementing body cells together, as an aid to resisting infection, as an aid in maintaining the characteristics of youth, enlarged tonsils, skin itch, white spots on the fingernails; which are the diseases, symptoms and conditions for which the article was held out during a series of lectures given by Lelord Kordel at the Masonic Temple and Fort Wayne Hotel, Detroit, Michigan during the period April 4 through April 14, 1961.

GRF/mmj
9/25/61

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 87.—October Term, 1969

United States, Petitioner, v. Lelord Kordel and Alfred Feldten. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[February 24, 1970]

Mr. Justice Stewart delivered the opinion of the Court.

The respondents are the president and vice president, respectively, of Detroit Vital Foods, Inc. They were convicted in the United States District Court for the Eastern District of Michigan, along with the corporation, for violations of the Federal Food, Drug, and Cosmetic Act.[1] The Court of Appeals for the Sixth Circuit reversed the respondents' convictions on the ground that the Government's use of interrogatories to obtain evidence from the respondents in a nearly contemporaneous civil condemnation proceeding operated to violate their Fifth Amendment privilege against compulsory self-incrimination.[2] We granted certiorari to consider the questions raised by the Government's invocation of simultaneous civil and criminal proceedings in the enforcement of federal law.[3]

In March 1960 the Division of Regulatory Management of the Food and Drug Administration (hereafter

[1] 21 U. S. C. § 301 *et seq.*

[2] *United States* v. *Detroit Vital Foods, Inc.*, 407 F. 2d 570. The Court of Appeals initially reversed the judgments of conviction of all three defendants, but on the Government's petition for rehearing it affirmed with respect to the corporation.

[3] 395 U. S. 932.

"FDA") instructed the agency's Detroit office to investigate the respondents' possible violations of the Food, Drug, and Cosmetic Act. Within a month the Detroit office recommended to the Division a civil seizure of two of the respondents' products, "Korleen" and "Frutex"; within another month the Division similarly recommended seizure to the FDA's General Counsel. On June 6, 1960, the General Counsel requested the United States Attorney for the Eastern District of Michigan to commence an *in rem* action against these products of the corporation, and the United States Attorney filed a libel three days later. The corporation, appearing as the claimant, answered the libel on September 12, 1960. An FDA official in the Division of Regulatory Management then prepared extensive interrogatories to be served on the corporation in this civil action. The United States Attorney filed the agency's interrogatories on January 6, 1961, pursuant to Rule 33 of the Federal Rules of Civil Procedure.[4]

After the Division official had drafted the interrogatories, he recommended that pursuant to § 305 of the Food, Drug, and Cosmetic Act the FDA serve upon the corporation and the respondents a notice that the agency contemplated a criminal proceeding against them with respect to the transactions that were the subject of the civil action.[5] On January 9, 1961, three days after the

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[4] Rule 33 provides in pertinent part: "Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party."

[5] Section 305 of the Act, 21 U. S. C. § 335, provides,

"Before any violation of [the Act] . . is reported by the Secretary [of the Department of Health, Education, and Welfare] to any United States attorney for institution of a criminal proceeding, the person against whom such proceeding is contemplated shall be given

filing of the interrogatories in the civil action, the Detroit office received an instruction from the Division to serve the statutory notice. The Detroit office complied 10 days later, and on March 8, 1961, the agency held a hearing on the notice.

On April 10, the corporation, having received the FDA's interrogatories but not yet having answered them, moved to stay further proceedings in the civil action or, in the alternative, to extend the time to answer the interrogatories until after disposition of the criminal proceeding signaled by the § 305 notice. The motion was accompanied by the affidavit of counsel. The moving papers urged the District Court to act under Rule 33 "in the interest of substantial justice" and as a "balancing of hardship and equities of the respective parties . . . ." Permitting the Government to obtain proof of violations of the Act by resort to civil discovery procedures, the movant urged, would be "improper" and would "work a grave injustice against the claimant"; it would also enable the Government to have pretrial discovery of the respondents' defenses to future criminal charges. Counsel expressly disavowed any "issue of a self-incrimination privilege in favor of the claimant corporation." And nowhere in the moving papers did counsel raise a claim of the Fifth Amendment privilege against compulsory self-incrimination with respect to the respondents.

On June 21, 1961, the District Court denied the motion upon finding that the corporation had failed to demonstrate that substantial prejudice and harm would result

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appropriate notice and an opportunity to present his views, either orally or in writing, with regard to such contemplated proceeding." Service of the statutory notice did not necessarily mean that a criminal prosecution would follow; the testimony before the District Court on the respondents' pretrial motion to suppress evidence indicated that fewer than 10% of the matters involving a § 305 notice reach the stage of either indictment or information.

from being required to respond to the interrogatories. The court reasoned that the § 305 notice did not conclusively indicate the Government would institute a criminal proceeding, that six to 12 months could elapse from the service of the statutory notice to initiation of a criminal prosecution, and that the Government could obtain data for a prosecution from the testimony in the civil action or by subpoenaing the books and records of the corporation. Accordingly, the court concluded, the interests of justice did not require that the Government be denied the information it wanted simply because it had sought it by way of civil-discovery procedures. On September 5, 1961, in compliance with the court's directive, the corporation, through the respondent Feldten, answered the Government's interrogatories.

On July 28, 1961, five weeks after the District Court's order but more than a month before receipt of the answers to the interrogatories, the Director of the FDA's Detroit office recommended a criminal prosecution to the Division. The Division forwarded the recommendation to the General Counsel on August 31, 1961, still prior to receipt of Feldten's answers. While the matter was pending in the General Counsel's office, the Division officer who had originally drafted the proposed interrogatories recommended that additional violations of the statute be alleged in the indictment. On June 13, 1962, the Department of Health, Education, and Welfare requested the Department of Justice to institute a criminal proceeding, and about two months after that the latter department instructed the United States Attorney in Detroit to seek an indictment. The civil case, still pending in the District Court, proceeded to settlement by way of a consent decree in November 1962, and eight months later the Government obtained the indictment underlying the present judgments of conviction.

I

At the outset, we assume that the information Feldten supplied the Government in his answers to the interrogatories, if not necessary to the proof of the Government's case in the criminal prosecution, as the Court of Appeals thought, at least provided evidence or leads useful to the Government.[6] However, the record amply supports the express finding of the District Judge who presided at the criminal trial, and who held an extensive evidentiary hearing on the respondents' pretrial motion to suppress evidence, that the Government did not act in bad faith in filing the interrogatories. Rather, the testimony before the trial court demonstrated that the Division of Regulatory Management regularly prepares such interrogatories upon the receipt of claimants' answers to civil libels, and files them in over three-fourths of such cases, to hasten their disposition by securing admissions and laying the foundation for summary judgments.

The Court of Appeals thought the answers to the interrogatories were involuntarily given. The District Judge's order denying the corporation's motion to defer the answers to the interrogatories, reasoned the court, left the respondents with three choices: they could have refused to answer, thereby forfeiting the corporation's property that was the subject of the libel; they could have given false answers to the interrogatories, thereby subjecting themselves to the risk of a prosecution for perjury; or they could have done just what they did—disclose the requested information, thereby supplying the Government with evidence and leads helpful in securing their indictment and conviction.[7]

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[6] Compare 407 F. 2d, at 575, with *id.*, at 572.

[7] *Id.*, at 573.

In this analysis we think the Court of Appeals erred. For Feldten need not have answered the interrogatories. Without question he could have invoked his Fifth Amendment privilege against compulsory self-incrimination.[8] Surely Feldten was not barred from asserting his privilege simply because the corporation had no privilege of its own,[9] nor because the proceeding in which the Government sought information was civil rather than criminal in character.[10]

To be sure, service of the interrogatories obliged the corporation to "appoint an agent who could, without fear of self-incrimination, furnish such requested information as was available to the corporation."[11] The cor-

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[8] *Wilson* v. *United States*, 221 U. S. 361, 377, 385; *Boyd* v. *United States*, 116 U. S. 616, 633–635; cf. *United States* v. *42 Jars . . . "Bee Royale Capsules,"* 162 F. Supp. 944, 946, aff'd, 264 F. 2d 666.

[9] *Curcio* v. *United States*, 354 U. S. 118, 124; *Wilson* v. *United States*, *supra*, at 385; *United States* v. *3963 Bottles . . . of . . . "Enerjol Double Strength,"* 265 F. 2d 332, 335–336, cert. denied, 360 U. S. 931; *United States* v. *30 Individually Cartoned Jars . . . "Ahead Hair Restorer . . . ,"* 43 F. R. D. 181, 187; cf. *Shapiro* v. *United States*, 335 U. S. 1, 27. That the corporation has no privilege is of course long-established, and not disputed here. See *George Campbell Painting Corp.* v. *Reid*, 392 U. S. 286, 288–289; *Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186, 196, 208, 209–210; *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 726–727; *Essgee Co.* v. *United States*, 262 U. S. 151, 155–156; *Wheeler* v. *United States*, 226 U. S. 478, 489–490; *Baltimore & Ohio R. Co.* v. *ICC*, 221 U. S. 612, 622–623; *Hale* v. *Henkel*, 201 U. S. 43, 74–75; cf. *Curcio* v. *United States*, *supra*; *White* v. *United States*, 322 U. S. 694, 698, 705.

[10] *Gardner* v. *Broderick*, 392 U. S. 273, 276; *McCarthy* v. *Arndstein*, 266 U. S. 34, 40; *Counselman* v. *Hitchcock*, 142 U. S. 547, 562, 563–564; *Boyd* v. *United States*, *supra*; *United States* v. *The Saline Bank*, 1 Pet. 100, 104; 8 J. Wigmore on Evidence § 2257, at 339–340 (McNaughten ed. 1961); C. McCormick on Evidence § 123, at 259 (1954).

[11] *United States* v. *3963 Bottles . . . of . . . "Enerjol Double Strength,"* *supra*, at 336; cf. *United States* v. *48 Jars . . . "Tranquilease,"* 23 F. R. D. 192, 195, 196; 2A W. Barron & A. Holtzoff, Federal Practice and Procedure § 651, at 101 (1961).

poration could not satisfy its obligation under Rule 33 simply by pointing to an agent about to invoke his constitutional privilege. "It would indeed be incongruous to permit a corporation to select an individual to verify the corporation's answers, who because *he* fears self-incrimination may thus secure for the corporation the benefits of a privilege it does not have." [12] Such a result would effectively permit the corporation to assert on its own behalf the personal privilege of its individual agents.[13]

The respondents press upon us the situation where no one can answer the interrogatories addressed to the corporation without subjecting himself to a "real and appreciable" risk of self-incrimination.[14] For present purposes we may assume that in such a case the appropriate remedy would be a protective order under Rule 30 (b), postponing civil discovery until termination of the criminal action.[15] But we need not decide this troublesome question. For the record before us makes clear that even though the respondents had the burden of showing that the Government's interrogatories were improper,[16] they never even asserted, let alone demon-

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[12] *United States* v. *3963 Bottles . . . of . . . "Enerjol Double Strength," supra.*

[13] Cf. *George Campbell Painting Corp.* v. *Reid, supra,* at 289; *Hale* v. *Henkel, supra,* at 69–70.

[14] Cf. *Minor* v. *United States,* 396 U. S. 87, —; *Leary* v. *United States,* 395 U. S. 6, 16; *Marchetti* v. *United States,* 390 U. S. 39, 48; *Mason* v. *United States,* 244 U. S. 362, 365.

[15] See *Paul Harrigan & Sons* v. *Enterprise Animal Oil Co.,* 14 F. R. D. 333.

[16] *Lucy* v. *Sterling Drug, Inc.,* 240 F. Supp. 632, 634; *Glick* v. *McKesson & Robbins, Inc.,* 10 F. R. D. 477, 479, 480; *Bowles* v. *Safeway Stores, Inc.,* 4 F. R. D. 469, 470; *Blanc* v. *Smith,* 3 F. R. D. 182, 183. The respondents, urging that the Government had the burden of establishing the availability of an agent to answer for the corporation, rely upon the decision of the Court of Appeals for the District of Columbia Circuit in *Communist Party* v. *United States,* 118 U. S. App. D. C. 61, 331 F. 2d 807, cert.

strated, that there was no authorized person who could answer the interrogatories without the possibility of compulsory self-incrimination.[17] To the contrary, the record shows that nobody associated with the corporation asserted his privilege at all. The respondents do not suggest that Feldten, who answered the interrogatories on behalf of the corporation, did so while unrepresented by counsel or without apreciation of the possible consequences. His failure at any time to assert the constitutional privilege leaves him in no position to complain now that he was compelled to give testimony against himself.[18]

Kordel's claim of compulsory self-incrimination is even more tenuous than Feldten's. Not only did Kordel never assert the privilege; he never even answered any interrogatories. The Court of Appeals nevertheless reversed his conviction because it thought it "clear from the record that Detroit Vital Foods, Inc., was merely the corporate device through which Kordel sold his products. The Government naturally wanted to cut through the facade and get to Kordel who was the president and dominant personality in the corporation."[19] We disagree. The Government brought its libel against the goods; the corporation, not Kordel, appeared as claimant. The

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denied, 377 U. S. 968. But there the court departed from the customary allocation of the burden on the ground that the mere act of volunteering the information sought, or even of showing that an effort had been made to find someone who would answer, was itself potentially incriminatory. *Id.*, at 68–69, 331 F. 2d, at 814–815.

[17] See *United States* v. *American Radiator & Standard Sanitary Corp.*, 388 F. 2d 201, 204, cert. denied, 390 U. S. 922; *United States* v. *Simon*, 373 F. 2d 649, 653, cert. granted *sub nom. Simon* v. *Wharton*, 386 U. S. 1030, vacated as moot, 389 U. S. 425; but see *Nat'l Discount Corp.* v. *Holzbaugh*, 13 F. R. D. 236, 237.

[18] *Gardner* v. *Broderick*, 392 U. S. 273, 276; *Rogers* v. *United States*, 340 U. S. 367, 372–375; *United States* v. *Monia*, 317 U. S. 424, 427; *Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, 113; *Brown* v. *Walker*, 161 U. S. 591, 597.

[19] 407 F. 2d, at 575.

Government subsequently prosecuted Kordel as an officer of the company. If anyone has sought to cut through the corporate facade so far as the Fifth Amendment privilege is concerned, it is Kordel: he has, in effect, attempted to fashion a self-incrimination claim by combining testimony that he never gave and an assertion of the privilege that he never made with another assertion of the privilege that his company never had.

The Court of Appeals thought that Kordel must go free in any event because the Government had used Feldten's admissions in proving its criminal case against both respondents, in violation of the rule in *Bruton* v. *United States*.[20] This too was error. Feldten's admissions were never introduced in evidence at the trial, and thus Kordel cannot maintain that the reception in evidence of a codefendant's inculpatory statements violated his Sixth Amendment right to confrontation.[21]

II

The respondents urge that even if the Government's conduct did not violate their Fifth Amendment privilege against compulsory self-incrimination, it nonetheless reflected such unfairness and want of consideration for justice as independently to require the reversal of their convictions. On the record before us, we cannot agree that the respondents have made out either a violation of due process or a departure from proper standards in the administration of justice requiring the exercise of our supervisory power. The public interest in protecting consumers throughout the Nation from misbranded drugs requires prompt action by the agency charged with responsibility for administration of the federal food and drug laws. But a rational decision whether to proceed criminally against those responsible for the misbranding

[20] 391 U. S. 123. See 407 F. 2d, at 575.

[21] See *Bruton* v. *United States*, *supra*, at 126.

may have to await consideration of a fuller record than that before the agency at the time of the civil seizure of the offending products. It would stultify enforcement of federal law to require a governmental agency such as the FDA invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial.[22]

We do not deal here with a case where the Government has brought a civil action solely to obtain evidence for its criminal prosecution [23] or has failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution; [24] nor with a case where the defendant is without counsel [25] or reasonably fears prejudice from adverse pretrial publicity or other unfair injury; [26] nor with any other special circumstances that might suggest the unconstitutionality or even the impropriety of this criminal prosecution.[27]

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[22] Cf. *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, 51–52 (Sherman Act).

[23] Cf. *United States* v. *Procter & Gamble Co.*, 356 U. S. 677, 683–684; *United States* v. *Pennsalt Chemicals Corp.*, 260 F. Supp. 171; and see *United States* v. *Thayer*, 214 F. Supp. 929; *Beard* v. *New York Cent. R. Co.*, 20 F. R. D. 607.

[24] See *Smith* v. *Katzenbach*, 122 U. S. App. D. C. 113, 114–116, 351 F. 2d 810, 811–813; *United States* v. *Lipshitz*, 132 F. Supp. 519, 523; *United States* v. *Guerrina*, 112 F. Supp. 126, 128.

[25] Cf. *Nelson* v. *United States*, 93 U. S. App. D. C. 14, 19, 21, and n. 19, 208 F. 2d 505, 510, 512, and n. 19, cert. denied, 346 U. S. 827.

[26] Cf. *United States* v. *American Radiator & Standard Sanitary Corp.*, 388 F. 2d 201, 204–205, cert. denied, 390 U. S. 922.

[27] Federal courts have deferred civil proceedings pending the completion of parallel criminal prosecutions when the interests of justice seemed to require such action, sometimes at the request of the prosecution, *Campbell* v. *Eastland*, 307 F. 2d 478, cert. denied, 371 U. S. 955; *United States* v. *Bridges*, 86 F. Supp. 931, 933; *United States* v. *30 Individually Cartoned Jars . . . "Ahead Hair Restorer . . . ,"* 43 F. R. D. 181, 187 n. 8; *United States* v. *One*

Overturning these convictions would be tantamount to the adoption of a rule that the Government's use of interrogatories directed against a corporate defendant in the ordinary course of a civil proceeding would always immunize the corporation's officers from subsequent criminal prosecution. The Court of Appeals was correct in stating that "the Government may not use evidence against a defendant in a criminal case which has been coerced from him under penalty of either giving the evidence or suffering a forfeiture of his property." [23] But on this record there was no such violation of the Constitution, and no such departure from the proper administration of criminal justice.

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK did not take part in the decision of this case.

1964 Cadillac Coupe DeVille, 41 F. R. D. 352, 353–354; *United States* v. *$2,437 United States Currency*, 36 F. R. D. 257; *United States* v. *Steffes*, 35 F. R. D. 24; *United States* v. *Maine Lobstermen's Assn.*, 22 F. R. D. 199; *United States* v. *Cigarette Merchandisers Assn.*, 18 F. R. D. 497; *United States* v. *Linen Supply Institute*, 18 F. R. D. 452, sometimes at the request of the defense, *Kaeppler* v. *Jas. H. Matthews & Co.*, 200 F. Supp. 229; *Perry* v. *McGuire*, 36 F. R. D. 272; cf. *Nichols* v. *Philadelphia Tribune Co.*, 22 F. R. D. 89, 92.

[23] 407 F. 2d, at 575–576.